

**THE ROLE OF LAW IN THE DEVELOPMENT OF THE NONPROFIT
SECTOR IN NIGERIA AND SOUTH AFRICA**

BY

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DECLARATION

I declare that this thesis submitted for the degree of Doctor of Philosophy at the University of Cape Town has not been previously submitted by me for a degree at this or any other university, that it is my work and that all referenced material in it have been duly acknowledged.

Signed by candidate

Ada Obianuju Okoye
signature removed

DEDICATION

Dedicated with thanksgiving to God for the families of Okoye, Onyema and Ordor,
all of which I am part,
and whose warm and firm support nurtured me as I nurtured this work.
Thank you!

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TABLE OF CONTENTS

	Page
Title Page	i
Declaration	ii
Abstract	iii
Dedication	iv
Acknowledgments	v
Table of Contents	vii
Table of Cases	xi
Table of Statutes	xiii
List of Abbreviations	xv
Table of Appendices	xviii
 CHAPTER 1: INTRODUCTION	 1
1.1 Background to the Research	1
1.2 Characteristics of Nonprofit Organisations	4
1.3 Research Justification	8
1.4 Methodology and Scope of Study	10
1.5 Definition of Terminology	14
1.6 Outline of the Thesis	17
1.7 Conclusion	20
 CHAPTER 2: THE NONPROFIT SECTOR IN THE CONTEXT OF LAW AND DEVELOPMENT	
2.1 Introduction	22
2.1.1 Theories of the Nonprofit Sector	22
2.1.2 Political Theories of the Nonprofit Sector	23
2.1.3 Economic Theories of the Nonprofit Sector	27
2.1.4 Sociological Theories of the Nonprofit Sector	31
2.2 The Nonprofit Sector in an African Context	34
2.3 Theories of Law in Development	38
2.4.1 Theory of Alternative Development	39
2.4.2 Basic Needs Theory	42
2.5 The Nonprofit Sector in the Context of Law and Development	45
2.6 The Legal Environment for the Nonprofit Sector	50
2.7 Conclusion	55

CHAPTER 3: THE NONPROFIT SECTOR IN NIGERIA: GROWTH FACTORS AND LEGAL FRAMEWORK	58
3.1 Introduction	58
3.2 The Development of the Modern Nonprofit Organisation in Nigeria	59
3.2.1 Government Failure Theory	59
3.2.2 Alternative Development Theory	62
3.2.3 International Relations Theory	64
3.2.4 Nationalist and Political Theory	66
3.3 Contemporary Developments in the Nonprofit Sector in Nigeria	69
3.4 Legal Environment for the Third Sector in Nigeria	72
3.5 Legal Provisions for Associational Activity in Nigeria	74
3.6 Registration and Tax Provisions	77
3.6.1 Registration as a Company Limited by Guarantee	77
3.6.2 Registration as an Incorporated Trustee	78
3.6.3 Registration and Non-registration of Associations	79
3.6.4 Tax Status	81
3.7 Human Resources in the Nonprofit Sector in Nigeria	83
3.7.1 Employment Relations in the Nonprofit Sector in Nigeria	83
3.7.2 The Development of Employment Law in Nigeria	86
3.7.3 Employment Law in the Nonprofit Sector in Nigeria	89
3.7.4 Employment Contracts and Working Conditions Legislation	90
3.7.5 Trade Unions and Labour Relations Legislation	95
3.7.6 Safety, Health and Social Security Legislation	98
3.7.7 Other Sources of Legal Regulation of Nonprofit Sector Employment	103
3.8 Conclusion	104
CHAPTER 4: LAW IN THE DEVELOPMENT OF THE NONPROFIT SECTOR IN SOUTH AFRICA	107
4.1 Introduction	107
4.2 The Growth of the Current Non-Profit Sector in South Africa	107
4.2.1 The Apartheid Era	108
4.2.2 The Transition Period: 1990 – 1994	111
4.2.3 The Post-apartheid Period	114

4.3	The Character of the Nonprofit Sector in Contemporary South Africa	118
4.3.1	Government Relations with the Nonprofit Sector	118
4.3.2	Descriptive Features of the Non-Profit Sector in South Africa	122
4.4	The Legal Environment for the Nonprofit Sector in South Africa	125
4.5	Permissible Purposes of Association	126
4.6	Registration and Tax Framework	133
4.6.1	The Nonprofit Organisations Act 1997	133
4.6.2	The Tax and Fundraising Laws	136
4.7	Employment Law in the Nonprofit Sector in South Africa	140
4.7.1	Labour Relations Act 1995	141
4.7.2	Basic Conditions of Employment Act 1997	143
4.7.3	Employment Equity Act 1998	145
4.7.4	Skills Development Act 1998	146
4.8	Conclusion	147

CHAPTER 5: COMPARATIVE ANALYSIS OF THE ROLE OF LAW IN THE DEVELOPMENT OF THE NONPROFIT SECTOR IN NIGERIA AND SOUTH AFRICA

5.1	Introduction	150
5.2	The Development of the Modern Nonprofit Sector in South Africa and Nigeria	150
5.2.1	South African Civil Society	151
5.2.2	Nigerian Civil Society	153
5.2.3	Similarities in Growth Factors	154
5.2.4	Divergences in Growth Factors	158
5.3	Legal Developments	159
5.3.1	Legal Framework for Associational Activities	160
5.3.2	Registration Framework	164
5.3.3	Funding and Tax Framework	167
5.3.4	Employment Relations and Law in the Nonprofit Sector	171
5.4	Trends in Nonprofit Sector Operations in South Africa and Nigeria	177
5.4.1	Government –Nonprofit Sector Relations	178
5.4.2	Funding	182
5.4.3	Staffing	186
5.4.4	General Trends	190

5.5 Conclusion	193
CHAPTER 6: CONCLUSION	194
6.1 Introduction	194
6.2 Linkages between Theories and Findings on Factors for the Growth of the Nonprofit Sector	195
6.2.1 Summary of theories from nonprofit sector studies	195
6.2.2 Conclusions on Growth Factors	197
6.3 Conclusions on the Legal Environment for the Nonprofit Sector	201
6.3.1 Conclusions: South Africa	202
6.3.2 Conclusions: Nigeria	205
6.4 Recommendations	207
6.4.1 Recommendations on South Africa	207
6.4.2 Recommendations on Nigeria	214
6.5 Concluding Remarks	221
Bibliography	223
Appendices	239

TABLE OF CASES

South Africa

- Adonis v Western Cape Education Department and another (1997) 8 BLLR 1005 (LC)
- CIR v Witwatersrand Association of Racing Clubs (1960 AD)
- IMATU & others v Greater Johannesburg Metropolitan Council & others (2000) 12 BLLR 1449 (LC)
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Laws v London Chronicle Ltd.[1959] 2 All ELR 285

Faccenda Chicken Ltd. v Fowler [1986] 1 All ER 617

TABLE OF STATUTES

South Africa

Basic Conditions of Employment Act 1998 (BCEA)
 Constitution of the Republic of South Africa 1996
 Employment Equity Act 1998 (EEA)
 Factories Act 1987
 Fundraising Act 1978
 Income Tax Act 1962
 Industrial Conciliation Act 1924
 Industrial Conciliation Act, Labour Relations Act 1981
 Non-Profit Organisations Act 1997
 Skills Development Act 1998
 Taxation Laws Amendment Act No. 30 of 2000

Nigeria

Capital Gains Tax Act
 Companies Act 61 of 1973
 Companies and Allied Matters Act 1990 (CAMA)
 Companies Income Tax Act 1979
 Constitution of the Federal Republic of Nigeria 1999 (CFRN)
 Labour Act 1974
 Labour Code 1945
 Labour Code Act 1958
 Labour Ordinance 1929
 Labour Relations Act 1995
 Master and Servants Ordinance 1917
 Minerals Ordinance 1923
 National Provident Fund Act 1961
 Nigerian Social Insurance Trust Fund Decree 1993
 Nigeria Social Insurance Trust Fund Act 1993 Rates of Contribution (Revision) Order 2000.
 State Security (Detention of Persons) Decree No. 2 of 1984
 Trade Unions Act 1973
 Trade Disputes Act 1976

Wages Boards and Industrial Council Act 1973

Workmen's Compensation Act 1987

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LIST OF ABBREVIATIONS

ANC	African National Congress
BCEA	Basic Conditions of Employment Act
CAC	Corporate Affairs Commission
CAMA	Companies and Allied Matters
CBO	Community Based Organisation
CAPP	Community Action for Popular Participation
CFCR	Citizen's Forum for Constitutional Reform Act
CFRN	Constitution of the Federal Republic of Nigeria
CIR	Commission for Internal Revenue
CITA	Companies Income Tax Act
CIRDDOC	Civil Resources Development and Documentation Centre
CLO	Civil Liberties Organisation
COF	Council on Foundations
CCG	Concerned Citizens Group
CRP	Constitutional Rights Project
CSO	Civil Society Organisation
DEVNET	Development Information Network
DFID	Department for International Development
DRC	Development Resources Centre
EEA	Employment Equity Act
FICA	Financial Intelligence Centre Act
GDP	Gross Domestic Products
GEAR	Growth, Employment and Redistribution Strategy
GR	Global Rights
HIV	Human Immune Deficiency Virus
HURILAWS	Human Rights Law Service
ICA	Industrial Conciliation Act
ICNL	International Centre for Not-For-Profit Law
IDASA	Institute for Democracy in South Africa
IDEA	Institute for Democracy and Electoral Assistance
ILO	International Labour Organisation
ITA	Income Tax Act

IMF	International Monetary Fund
LRA	Labour Relations Act
LRRDC	Legal Resource Research and Development Centre
NANGO	National Association of NGOs
NDA	National Development Agency
NEEDS	National Economic Empowerment and Development Strategy
NEPAD	New Partnership for Africa's Development
NGDO	Non Governmental Development Organisation
NGO	Non Governmental Organisation
NILR	Nigeria Internet Law Report
NPO	Non Profit Organisation
NPC	National Planning Commission
NPF	National Provident Fund
NPS	Non Profit Sector
NSITF	Nigeria Social Insurance Trust Fund
NTUC	National Trade Union Congress of Nigeria
OAU	Organisation of African Unity
OSJI	Open Society Justice Initiative
PAIA	Promotion of Access to Information Act
PBO	Public Benefit Organisation
PVO	Private Voluntary Organisation
PPP	Provincial Parliamentary Program
RDP	Reconstruction and Development Program
SANGOCO	South African National NGO Coalition
SAP	Structural Adjustment Program
TLAA	Taxation Laws Amendment Act
TMG	Transition Monitoring Group
TNDT	Transitional National Development Trust
TRC	Truth and Reconciliation Commission
TUA	Trade Unions Act
TUSEV	Third Sector of Turkey
TUCSA	Trade Union Council of South Africa
UK	United Kingdom
UN	United Nations

UNDP	United Nations Development Programme
USA	United States of America
USAID	United States Agency for International Development
VO	Voluntary Organisation
WACOL	Women's Aid Collective
WC	Wiehahn Commission
S.	Section
SS.	Sections
SECC	Soweto Electricity Crisis Committee

University of Cape Town

TABLE OF APPENDICES

APPENDIX A	South Africa Managerial Interview Report
APPENDIX B	South Africa: Staff Survey Report
APPENDIX C	Nigeria Managerial Interview Report
APPENDIX D	Nigeria Staff Survey Report
APPENDIX E	Nigerian Nonprofit Sector: Organisational Profile
APPENDIX F	South Africa: Managerial Interview Questions
APPENDIX G	South Africa: Non-Managerial Staff Questionnaire
APPENDIX H	Generic Statistics of the South African Nonprofit Sector
APPENDIX I	Nigeria: Managerial Interview Questions
APPENDIX J	Nigeria: Organisational Profile and Staff Questionnaire
APPENDIX K	Tabular Presentation of Appendix E Report
APPENDIX L	South Africa: Organisations used for Appendix A Report
APPENDIX M	Nigeria: Organisations used for Appendix C Report
APPENDIX N	Nigerian Organisations used for Profile

CHAPTER ONE

INTRODUCTION

1.1 Background to the Research

The study of the nonprofit sector as the conglomeration of private initiatives in addressing public needs is increasing to match the growth of formal and informal associations of people in countries across the world. While writers generally agree that these private sector initiatives are not a new thing, there is a recognition that there has been a resurgence of a deliberate, conscious need to build and maintain these associations of civil society.¹

This phenomenon has been described as a 'global associational revolution' attributable, in part, to a general ideological change in thinking about the role of the state, the realisation that there are limits to what the state can provide and on what the market can offer in addressing public problems and meeting human needs.² Describing American society in the 19th Century, De Tocqueville observed that:

*'The Americans make associations to give entertainments, to found seminaries, to build inns, to construct churches, to diffuse books, to send missionaries to the antipodes; in this manner they found hospitals, prisons, and schools. If it is proposed to inculcate some truth or to foster some feeling by the encouragement of a great example, they form a society. Wherever at the head of some new undertaking you see the government in France . . . in the United States you will be sure to find an association.'*³

Many different factors are generally responsible for the development of the nonprofit sector. Some stress the failure of both markets and governments to meet demand for the kinds of activities voluntary agencies provide, while

¹ C. Pei-heng, *Non-Governmental Organisations at the United Nations: Identity, Role, and Function* (New York: Praeger, 1981), p.20; M. Edwards & D. Hulme, 'NGO Performance and Accountability Introduction and Overview' in M. Edwards & D. Hulme (Eds.), *Non-Governmental Organisations - Performance and Accountability: Beyond the Magic Bullet* (London: Earthscan Publications, 1995) p.4

² The Gazette Online, newspaper of the Johns Hopkins University, January 3, 2000, Vol.29, No.16, p.1, accessed at <http://www.jhu.edu/~gazette/2000/jan0300/03lestxt.html>, on 29/4/2002.

³ A. De Tocqueville, 'Of the Use Which the Americans Make of Public Associations in Civil Life', Extract from Alexis De Tocqueville, *Democracy in America* (1835), republished in Brian O'Connell (Ed.), *America's Voluntary Spirit A Book of Readings* (New York: The Foundation Center, 1983) p.54.

others emphasise the role of the organisational culture of a society in providing a conducive environment for nonprofit organisations to grow.⁴

The nonprofit sector is identified by a variety of terminologies, leading to the observation that 'nobody can even agree upon what they should be called: voluntary organisations, private development organisations, people's organisations, private voluntary organisations, the third sector. It is the unsatisfactory term, 'non-governmental' that seems most intent on not going away.'⁵ The sector has also been described as the third sector, but even this is disputed by the assertion that only if most of the beneficiaries or clients of a nonprofit organisation are also its members is it appropriately considered as belonging to the third sector, not where organisations exist to serve persons who are not its members, through employees who produce and distribute benefits.⁶

In this work, the term 'nonprofit' has been adopted as a working description, as that is the generic element that distinguishes the sector from the commercial component of the private sector. This does not however mean that nonprofit organisations do not ever record a profit, but that the organisation does not primarily exist to make profit and that where profits are earned, they are not distributed but are channelled back into the work of the organisation.⁷

The fact that the sector employs an increasing workforce worldwide is also acknowledged. For instance, the Bangladesh Rural Advancement Committee, one of the foremost nonprofit development agencies, was reported to have a staff strength of over twelve thousand in 1995.⁸ This fact points to two things at least. First it acknowledges the growth of the nonprofit sector into a broader field with more complex characteristics than the simple volunteer-

⁴ I. Smillie, 'Changing Partners: Northern NGOs, Northern Governments' in I. Smillie and H. Helmich (Eds.), *Non-Governmental Organisations and Governments: Stakeholders For Development* (Paris: OECD, 1993) p.16.

⁵ Ibid. at 14.

⁶ N. Uphoff, 'Why NGOs are not a Third Sector: A Sectoral Analysis with Some Thoughts on Accountability, Sustainability and Evaluation' in Edwards and Hulme op. cit. at 20.

⁷ L. M. Salamon, *America's Nonprofit Sector: A Primer* (New York: The Foundation Centre, 1999), pp. 9 and 11.

⁸ Edward and Hulme, *op.cit* at 4.

character with which nonprofits are traditionally associated, a character which 'gives the impression that the people involved in such organisations cannot be paid or be highly professional employees.'⁹ These developments notwithstanding, the subject of employment relations in the nonprofit sector does not seem to have crystallised into a field of study. Rather, attention is focused on funding, management and networking with the occasional reference to the 'fiduciary relationship between staff and trustees of non-profit organisations and those who provide the organisations with funds.'¹⁰ More is said about the gap in the literature in the section on justification.¹¹

Another issue identified as presenting a key challenge to the operation of the nonprofit sector across the world is the weakness of the legal framework.¹² Generally, scholarly interest in the legal environment for the work of nonprofit organisations seems to have grown in the late 1990s.¹³ One study investigated the effect of legal provisions on aspects of nonprofit work in the United States of America.¹⁴ The thrust of the research was the development of a favourable legal climate for the growth and development of the nonprofit sector, and so questions were raised around the general legal posture on associational activity, formation and financing of nonprofit organisations. In this way, the impact of the law was identified in the purpose, the creation and the funding of the nonprofit organisation. The present work examines these issues in relation to two African countries, namely Nigeria and South Africa, but goes further to identify and draw in employment law as a contributor to the basic legal environment for the

⁹ M. Kjaerum, 'The Contributions of Voluntary Organisations to the Development of Democratic Governance' in A. McKinstry Micou and B. Lindsnaes (Eds.) *The Role of Voluntary Organisations in Emerging Democracies* (Danish Centre For Human Rights and Institute of International Education, 1993) p.13.

¹⁰ Uphoff, *op. cit.* at 21.

¹¹ See 1.3 *infra*.

¹² Salamon in *The Gazette Online*, *op. cit.* (see footnote 2, *supra*).

¹³ See L. Salamon and S. Toepler, *The International Guide to Nonprofit Law* (New York: John Wiley & Sons Inc., 1997); J.L. Fleishman, 'Public Trust in Not-for-Profit Organisations and the Need for Regulatory Reform' in C. Clotfelter and T. Ehrlich (Eds.) *Philanthropy and the Nonprofit Sector in a Changing America* (Bloomington: Indiana University Press, 1999);

¹⁴ L. Salamon and S. Toepler, *The Influence of the Legal Environment on The Development of the Nonprofit Sector* (The Johns Hopkins University Centre for Civil Society Studies Working Paper Series No.17, 2000).

nonprofit sector, dealing as it does, with the human resources found in the sector.

1.2 Characteristics of Nonprofit Organisations

It is considered important to describe certain characteristics of the nonprofit sector as a prelude to the examination of the theorisation on the subject matter of the research, which is done in chapter two.

Nonprofit organisations have been classified in numerous ways, such as by their area of activity, spread of activity, sources of funding, size and structure, among others. However, the common denominator of nonprofit organisations is the fact that they do not distribute profits, and even where profit is made, it is used to further the purposes of the organisation.¹⁵

In addition to the non-profit-distributing characteristic, Salamon identifies five other defining characteristics of nonprofit sector organisations. These are self-governance, significant degree of voluntary participation, public benefit purposes, privately established in the sense of being institutionally separate from government.¹⁶

Nonprofit organisations have also been categorised on the basis of the motive for their existence. In this respect, Douglas identifies three broad motives that could lead to the establishment of a nonprofit organisation. The first, a 'self-seeking' interest which collective action protects and advances through mutual benefit organisations such as professional bodies.¹⁷ Yet, it is staunchly maintained that the fact that some nonprofits organisations exist primarily for the community of those who create and sustain them does not make them any less public-serving as such associational representation reflects the 'republic of republics' notion.¹⁸

¹⁵ E. James, 'Economic Theories of the Nonprofit Sector: A Comparative Perspective' in H. K. Anheier and W. Seibel (Eds.) *The Third Sector: Comparative Studies of Nonprofit Organisations* (Berlin/New York: Walter de Gruyter, 1990) p. 21.

¹⁶ Salamon (1999), op. cit at 10 and 11.

¹⁷ J. Douglas, 'Political Theories of Nonprofit Organisations' in Walter Powell (Ed.), *The Nonprofit Sector: A Research Handbook* (New Haven: Yale University Press, 1987) p.43 at 51.

¹⁸ J.L. Fleishman, 'Public Trust in Not-for-Profit Organisations and the Need for Regulatory Reform' in C. Clotfelter and T. Ehrlich (Eds.) *Philanthropy and the Nonprofit Sector in a Changing America* (Bloomington: Indiana University Press, 1999) p.173.

Another motive could be altruistic, as for instance when a group of wealthy people set up a nonprofit organisation to provide housing for the poor. This type of nonprofit agency is generally known as the public benefit organisation. Another motivation grows out of the need to keep government alive to its responsibilities. Therefore, in this case, instead of private provision of housing for the poor, a political action organisation or pressure group may be constituted to press for government action to meet this need.¹⁹ In all three scenarios, a nonprofit organisation is the result.

A corresponding situation in a developing country would be where a nongovernmental organisation (NGO), working in the area of community development, has to choose between direct provision of basic activities like primary schools for underserved areas, and advocacy to bring the attention of government to the lack of such facilities and press for redressing policies.²⁰

In relation to functionality, nonprofit organisations are generally perceived as having an easier propensity to work with, and as providing services that supplement the resources of family and informal networks of friends and neighbours.²¹

In terms of what they are *not*, the legitimate use of the term 'nonprofit' has been defined to exclude organisations that are engaged in criminal activities and organisations that have the ambition to govern, thus excluding political parties and syndicates such as the Mafia.²²

A default characteristic of nonprofit organisations is generally identified as the absence of regulatory controls. Whereas the public sector has codes of practice, and the business sector has a disciplinary framework of profit competition and product quality, there are few countries where nonprofit organisations have sought to broker agreements on self-regulation or offer indicators of expected quality in their work.²³ Where such indicators

¹⁹ Douglas, loc. cit.

²⁰ K. De Feyter, *World Development Law: Sharing Responsibility for Development* (Antwerp: Intersentia: 2001) pp.223-4.

²¹ Douglas, op cit at 43.

²² De Feyter, op. cit. at 217.

²³ D. Harding, *From Global to Local: Issues and Challenges Facing NGOs* (Durban: Olive Information Service, AVOCADO Series, 1994), p.22.

are found, it is usually not in relation to any regulatory controls on the quality of its work, but very often the result of independent effort to demonstrate the efficacy of organisational projects.²⁴

In relation to nonprofit organisations in developed countries, one classification of their activities has divided them into three generations, namely, those concerned primarily with relief activities, the second engaged in activities aimed at self-reliance and capacity building, and the third centred on global advocacy and education activities.²⁵ The third category emerged primarily to create a conducive environment for the first two to thrive.²⁶

As with every field of study, certain problems are acknowledged in the study of nonprofit sector organisations. One such problem is identified as a lack of differentiation of organisations, resulting in the lumping together of entities with very little similarity apart from their nonprofit status. As Anheier observes, 'the fact that the Ford Foundation and the Progressive Young Farmers' Association are both nonprofit does not imply that they necessarily reveal comparable organisational behaviour or face similar dilemmas.'²⁷ Welch reinforces the disparity factor when he makes reference to '... a sense of invidious comparison' between indigenous and international nongovernmental organisations, distinguishing the multi-billion annual budgets of agencies such as Human Rights Watch and Amnesty International, from those of smaller local organisations.²⁸ This heterogeneity has constituted a significant challenge to the study of the sector as a whole, as scholars prefer to focus on one or two types of nonprofit organisations.²⁹

With regard to employment, it must be noted that the sector is characterised by non-unionism, fixed term contracts, limited terminal or

²⁴ Ibid. This assertion is supported by findings from empirical research reflecting the concerns of nonprofit organisation managers as reported in Appendix A, item (vi).

²⁵ De Feyter op. cit. at 220-1

²⁶ Ibid. at 221.

²⁷ H.K. Anheier, 'Private Voluntary Organisations and the Third World: The Case of Africa' in H.K. Anheier and W. Seibel op. cit. at 368.

²⁸ C.E. Welch, "Human Rights and Development in Africa: NGOs" in P. T. Zeleza and P. J. McConaughay (Eds.) *Human Rights, The Rule of Law, and Development in Africa* (Philadelphia: University of Pennsylvania Press, 2004) p.204.

²⁹ W. Seibel and H.K. Anheier, 'Sociological and Political Science Approaches to the Third Sector' in W. Seibel and H.K. Anheier (Eds.), op. cit. at 11.

withdrawal benefits, a measure of trans-national funding and networking activity.³⁰ While non-unionist and trans-national employment have been treated within the commercial context, it remains virtually uncharted in nonprofit sector studies.³¹

The critiques of nonprofit organisations as showing lesser degrees of accountability, sometimes inadequate management and record-keeping, poor personnel practices have also been described as a trade-off between accountability in the public sector and flexibility and diversity in the private sector.³²

Invariably, nonprofit organisations straddle various categories of endeavour, and like the elephant in the *Six Blind Men of Hindustan*, will be lodged within the definition that suits the particular context in which they are mentioned. An example is the description, by a legal author, of two organisations used for the empirical study in this research as public interest law firms. This categorisation was informed by the specialised professional service rendered by the organisations, whereas in this research, they are categorised as civic advocacy nonprofit organisations, based on the range of issues they address.³³

The discussion in this section has highlighted general characteristics relevant to the present work. More specialised and complex characteristics rooted in the economic structure of nonprofit organisations, as compared to business establishments have also been identified.³⁴ Having described some

³⁰ See research reports in Appendixes A to E.

³¹ See respectively on non unionist employment and trans-national employment, I. McLoughlin and S. Gourlay, *Enterprise Without Unions: Industrial Relations in the Non-Union Firm* (Buckingham: Open University Press, 1994) and F. Morgenstern, *International Conflicts of Labour Law* (Geneva: ILO, 1984).

³² Douglas, op. cit. at 50.

³³ The Constitutional Rights Project in Nigeria and the Legal Resources Centre in South Africa were described as 'public interest law firms' in David McQuoid-Mason, 'Legal Aid and Development: Lessons from South Africa and Some Thoughts For Nigeria' Chapter 14 of J. Hatchard and A. Perry-Kessaris (Eds.), *Law and Development: Facing Complexity in the 21st Century* (London: Cavendish Publishing Ltd., 2003) p.207 at 215-6.

³⁴ See R.N. Anthony and D.W. Young, 'Characteristics of Nonprofit Organisations' in D.L. Gies, J.S. Ott and J.M. Shafritz (Eds.) *The Nonprofit Organisation: Essential Readings* (1990: Pacific Grove: Brooks/ Cole Publishing Company, 1990) pp.216-34.

general characteristics of nonprofit organisations, the next section is directed at describing certain factors that constitute the rationale for the present study.

1.3 Research Justification

The study can be justified on a number of grounds. The first has to do with the importance of the subject-matter. In this regard, the nonprofit sector, though largely a product of private initiative, has taken on greater significance in public life, by increasingly participating in tasks and services that are traditionally performed by government.³⁵ Research in twenty two countries across the world showed that the sector employed nineteen million full-time equivalent paid workers and another ten million full time-equivalent volunteers with a combined total expenditure of \$1.1 trillion within the five-year study period which fell mostly in the second-half of the 1990s.³⁶ Statistics from that research also show that if the nonprofit sector of the countries studied were assessed as a separate national economy, they would jointly comprise the eighth largest economy in the world.³⁷

Secondly, the supporting and supplemental roles of nonprofit associations in democratic processes and good governance are also evident across continents. Nonprofit agencies who deliver services to the population are increasingly utilised by the government to discharge a variety of service delivery functions. With the increasing responsibility placed on the nonprofit sector to play these distinct roles, among others, the interest in studying the internal and external workings of the sector has increased. In the United States, the nonprofit sector has become an established field of study, with research centres located in a growing number of Universities.³⁸ In universities

³⁵ C.E. Steuerle and V. A. Hodgkinson, 'Meeting Social Needs: Comparing the Resources of the Independent Sector and Government' in E.T. Boris and C.E. Steuerle (Eds.) *Nonprofits and Government: Collaboration and Conflict* (Washington D.C.: The Urban Institute Press, 1998), p.71.

³⁶ L. Salamon, H.K. Anheier, R. List and S. Toepler, *Global Civil Society: Dimensions of the Nonprofit Sector* (Baltimore: Johns Hopkins Comparative Nonprofit Sector Project, 1999) pp.6-8. The research covered the US, the UK, most of continental Europe, Japan, Israel, Australia and five countries in Latin America.

³⁷ Ibid. at 9.

³⁸ Some of these research centres are the Centre for Civil Society Studies at the Johns Hopkins University Institute for Policy Studies Center for Civil Society Studies www.jhu.edu/~ccss accessed on 16/1/2006; the Centre on Philanthropy at Indiana University,

in the United States, over two hundred and fifty nonprofit management courses are offered.³⁹

Further, in African countries, the activities of nonprofit organisations are significantly funded by foreign donors, who are usually foreign governments, diplomatic agencies, foundations, international nongovernmental organisations and so on.⁴⁰ This makes it even more imperative that an internal legal framework that enables continued and improved delivery by nonprofit organisations is developed.

In another context, a fourth ground of justification is found in the renewed vigour which has visited the subject of development in Africa with the advent of the New Partnership for Africa's Development (NEPAD) and the inauguration of the African Union at the intra continental level, and other developments at the intercontinental level, such as the passing of the Africa Growth and Opportunities Act 2000 by the United States Congress. While African governments commit to honour these pacts and utilise these opportunities, the import and benefits of these developments may remain unknown to the citizenry, who constitute the ultimate target of these initiatives. In this regard, nonprofit development organisations often serve as the bridge between the people and government. It is invariably these non-state agents that take on the task of analysing new phenomena and processes, interpreting their effects and communicating their import to the citizens. Opportunities for development which these programmes offer will very likely remain under-utilised by its target recipients without the intervention of development organisations, typically nonprofit development organisations.

A fifth ground which is linked to this last point is the fact that these nonprofit organisations play a major role in keeping government accountable to citizens, both by urging government's performance of their commitments

http://www.philanthropy.iupui.edu/nonprofit_research.html accessed on 21/1/2006; Centre for Civil Society at the University of Kwazulu-Natal, South Africa <http://www.ukzn.ac.za/ccs/> accessed on 21/1/2006.

³⁹ See website of the Seton Hall University, <http://tltc.shu.edu/npo/> accessed on 21/1/2006.

⁴⁰ See for example, United Nations Development Programme (UNDP), *Donor Profile: Nigeria* (Lagos: UNDP, 2002), pp.29-32, which lists forty-one donor agencies in Nigeria, all foreign, and only one of which was African, namely the African Development Bank.

under these new 'deals' and by monitoring the methods of implementation. To a great extent, the success of Africa's latest blueprint for development depends on how well these agents of development are adjusted to and outfitted for the new development paradigm. How prepared are they for the new season of Africa's life? What are the credentials of these nonprofit intermediaries in terms of their legal status? How has the law enabled or restricted their organisational, financial and human capacity for delivery? This research attempts to address some of these issues.

Clearly, as observed by Harding, 'The NGO world has come of age as an institutional phenomenon and as such is now another increasingly visible battleground for political and economic control in the world.'⁴¹ Yet, the legal position of this sector of human endeavour is often out of date, 'highly precarious and unclear'.⁴²

1.4 Methodology and Scope of Study

The research is principally doctrinal with a limited component of empirical research. Doctrinal research was conducted through a review of literature as well as an examination of relevant sources of law, both statutory and judicial.

For the empirical research, selected civic-advocacy organisations were visited in Nigeria and South Africa. The choice of these two countries was informed by their shared political status at the onset of the research, as developing democracies. Furthermore, it was felt that the location of these developing democracies within distinct economic contexts, one relatively advanced and the other developing, would make for a reasonably balanced representation of the nonprofit sector in Africa. Empirical research was carried out in Nigeria between January 2003 and January 2005, while in South Africa, it lasted from May 2004 to December 2005.

⁴¹ Harding, op. cit. at 23.

⁴² *Towards An Enabling Legal Environment for Civil Society*, Statement of the Sixteenth Annual Johns Hopkins International Fellows in Philanthropy Conference, Nairobi, Kenya, July 4-8, 2004, p.9, accessed at <http://www.jhu.edu/%7Ephilfellow/Kenya.pdf> on 28/1/2006.

The civic-advocacy organisation was selected as a result of the need to use a visible, prominent archetype of the nonprofit organisation common to the two countries. Organisations selected were those with a staff complement of four or more full time staff. Visits were made to all the organisations, in some cases twice or more, and all staff interviewed were full time employees.

Six civic-advocacy organisations were visited in Cape Town, South Africa. During the visits, interviews were conducted with managerial staff in each organisation, while questionnaires were administered to two non-managerial staff. The findings from the managerial interview are annexed as Appendix A, while the results of the staff survey are reported in Appendix B. Limitations of time and funding made it impracticable to visit nonprofit agencies in other parts of the country. Moreover, the literature as well as previous research on the South African nonprofit sector seemed to be adequately representative of the country.

In Nigeria, managerial interviews were conducted in six civic-advocacy organisations, with two each selected from Lagos in the south-west zone, Enugu in the south-east and Abuja in the north-central zone. The aim was to present a view of the practice across the country, representative of different urban cultures. There was however no difference attributable to the location of the organisations. In addition, two international organisations offering funding and technical assistance to Nigerian civil society organisations were visited. The purpose was to generate and incorporate some information from a donor's perspective, an element which was missing from the literature on Nigeria. The managerial interviews for Nigeria therefore covered six civic-advocacy organisations and two donor organisations. The findings are incorporated in Appendix C.

Further, in Nigeria, an initial survey of fourteen organisations was conducted with the aim of creating an organisational profile of the nonprofit sector, in the light of the dearth of generic literature on the sector. Of the fourteen organisations, three were based in Abuja in the north-central part of Nigeria, five in Enugu in the south-east, and six in Lagos in the south-west.

Visits were made to all the organisations and information was gathered by a combination of questionnaires and interviews. The questionnaire was designed in two parts, and is annexed as Appendix J. The resulting minor profile is incorporated as Appendix E to the thesis. This profiling exercise was not done for South Africa, as a large-scale countrywide research had been conducted on the South African nonprofit sector, from which a tabulated profile was adapted and annexed as Appendix H.⁴³

The outline of interview questions used for managerial staff in South Africa is annexed as Appendix F, while the survey administered to non-managerial staff in South Africa is incorporated as Appendix G. The outline of interview questions used for managerial staff in Nigeria is featured as Appendix I.

The empirical research can only be described as exploratory as predominantly open-ended questions were used to draw out facts not rigidly limited to particular indicators. Although the information generated on the Nigerian profile presents some quantitative results, as is evident from Appendices E and K, only a qualitative use is made of the findings, as the sample is too small to make any generalisations. However the quantitative findings are indicative of directions for further research and inferences are made from it where necessary.

With regard to the scope of the work, the quasi-historical literature review on the growth of the contemporary nonprofit sector in South Africa commences from the apartheid era. This is largely informed by the content of literary sources on the subject, which direct comparative analyses to apartheid and post-apartheid contrasts. Although there were charity organisations like the Red Cross and the Community Chest at the time, the perception of a sector so comprised was yet to crystallise. Further, the research does not specifically examine religious institutions although it is understood that the

⁴³ See M. Swilling and B. Russell, *The Size and Scope of the Non-Profit Sector in South Africa* (Co-published by the Graduate School of Public and Development Management, University of the Witwatersrand, The Centre for Civil Society and the University of Natal, 2002). See also 4.3.2. *infra*, for a description of previous research on the South African nonprofit sector.

legal framework for the nonprofit sector applies to the nonprofit activity of such institutions.

For Nigeria, the focus was on the post-independence period, with relevant references to the pre-independence context. The context of the Nigerian discussion was the human rights movement. As such, the discussion did not consider the history of ecclesiastical institutions such as the Church Missionary Society and the Young Women's Christian Association. Nevertheless, the legal framework described in Chapter three applies to these organisations as much as it does to all other organisations not established for profit.

The inclusion of employment law in the examination of the legal framework for the nonprofit sector was informed by a concern to expand the methodology employed by previous researchers. When reference is made to employees in the non-profit sector, it is often in relation to their capacity for effective delivery of the services of their employing organisation. This service-delivery approach, as opposed to an employer-employee approach focuses on skills-training, team-building, fund-raising, accountability and sustainability and is the subject-matter of much analysis of non-profit activities.⁴⁴ However these analyses fall short of examining the employment relationship between the staff of an organisation and the organisational entity, a factor which has major implications for sustainability of the nonprofit sector. The present work makes an effort to address the neglect described by one writer in the following terms:

'NGOs are accountable certainly to their contributors, and also to any donor agencies which provide them with funds, but also to some extent to public officials, and of course to their employees (although this is not often stated explicitly)'⁴⁵ -- emphasis added

⁴⁴ See for instance the following publications by Olive Organisation Development and Training Information Service, Durban: M. Kleinenberg, *Donors and Non-Government Organisation Ethics* (Mulberry Series, 1995); J. Vossen, *Capacity Building: Two Views* (Avocado Series, 1996); A. Kaplan, *NGOs, Civil Society and Capacity Building: Towards the Development of Strategy* (Avocado Series, 1994); K. Gibson, *Becoming Self-Sufficient: The Experience of US Non-governmental Organisations in Achieving Sustainability* (Mulberry Series, 1995)

⁴⁵ Uphoff, *op. cit.* at 24.

1.5 Definition of Terminology

Certain key terms will be encountered often in the thesis. Since scholars and researchers do not usually have uniform definitions for words in academic research, it is necessary to define these words in the context in which they are used in this study. The terms are defined in alphabetical order.

Civic-advocacy organisation

These are organisations that promote the participation of people and groups whom they serve in public policy and social processes by informing, mobilising and presenting views that represent the interests of their target groups. This ensures that such target groups are represented in lawmaking, and other public policy processes. The term 'civic-advocacy' is commonly used in the United States. Many nonprofit organisations have a civic-advocacy component to their work. For some, this starts at the inception of the organisation, while for others, it is incorporated as the organisation's work grows.⁴⁶

Civil society organisation

This refers to those organisations which are actively involved in socio-political processes related to the consolidation and maintenance of democracy and the exercise of civil rights. These supportive processes include provision of civic education, conflict resolution systems, peace-building initiatives, as well as gender mainstreaming in public life. In a general sense, civil society has been perceived as referring to 'all voluntarily constituted social relations, institutions, and organisations that are not reducible to the administrative grasp of the state.'⁴⁷ Civil society is seen to contribute to democracy in two key ways - first as a 'watchdog' to check the monopolistic tendencies of the state, and secondly, to foster solidarity, communitarian and associational

⁴⁶ For instance, *The House of Ruth*, a nonprofit organisation in Washington DC, USA, was established to provide shelter for women and children who were victims of domestic violence. In the course of their activities, they also assumed an advocacy role for the prevention of domestic violence and the counselling of perpetrators as well as the provision of legal services for shelter inmates. See <http://www.houseofruth.org> accessed on 17/1/2006.

⁴⁷ M. Singh, 'The Role of Civil Society in Promoting Democratic Development: Some Aspects of the South African Debate' in Kjaerum, op. cit. at 23-4.

values that lead citizens to achieve social goals together.⁴⁸ The term 'civil society' is thus wider than the civil society organisation, and the latter is a structural form of the former.

Legal environment

As used in this work, this term refers to the combination of legal provisions that have a direct application to the establishment, funding and administration of a nonprofit organisation. The issues sought to be captured by the use of the term legal environment in relation to the nonprofit sector in this work include the freedom and right of association, establishment, financing and employment in the sector. The first three issues were identified as part of the legal environment for the nonprofit sector in the conceptual work of Salamon and Toepler on the subject.⁴⁹ The fourth, that is employment, was added to highlight the legal issues raised by the human resource component of the sector, a subject that is treated distinctly and rarely.

Nonprofit organisation

The nonprofit organisation (NPO) is an organisation or association that is not established primarily for the purpose of making profit. Although the term 'nonprofit' is an expression in the negative, it does convey the common element shared by organisations described as such. This common element is that they do not distribute profits.⁵⁰ A more positive expression increasingly used interchangeably with nonprofit organisation is public benefit organisation (PBO). The nonprofit organisation is also referred to as 'nonprofit agency', particularly in the United States and as 'private voluntary organisation' (PVO) or charity in the United Kingdom.⁵¹ Sometimes the term 'not-for-profit' is used in place of nonprofit to emphasise the fact that the organisation is not primarily established for profit. In this work however, the

⁴⁸ Ibid.

⁴⁹ Salamon and Toepler (2002), op. cit. at 8.

⁵⁰ P.F. Drucker, *Managing the Non-Profit Organisation: Principles and Practices* (HarperBusiness, 1992), p.xiv.

⁵¹ For a host of terminologies describing the nonprofit sector, see E.T. Boris, 'Nonprofit Organisations in a Democracy: Varied Roles and Responsibilities' in E.T. Boris and C.E. Steuerle (Eds.) *Nonprofits and Government: Collaboration and Conflict* (Washington D.C.: The Urban Institute Press, 1998), p.3.

term 'nonprofit organisation' is used generally, and where necessary certain types of nonprofit are identified with terms that more specifically describe them.⁵² Thus such terms civic-advocacy organisation, civil society organisation, human rights organisation, service delivery organisation and public benefit organisation are used to contextualise the discussion.

Nonprofit sector

The conglomeration of organised private, voluntary and public benefit activity which operate outside the boundaries of the state and outside the market system. A key characteristic of this sector is that this activity is carried out through organisations which do not distribute profits to members. For this reason, they are different from typical private business organisations. Further, these organisations are self-governing and voluntary.⁵³ The nonprofit sector is a generic terminology that encompasses nonprofit organisations which, in different contexts, are described in various other terms such as nongovernmental organisation (NGO), civil society organisation (CSO), civic-advocacy organisation, community based organisation (CBO), nongovernmental developmental organisation (NGDO), voluntary organisation (VO), non-state organisation and independent organisation. Quite often the word 'organisation' in these terms is used interchangeably with 'association' and the term 'civil society sector' is used interchangeably with 'nonprofit sector'.

Nongovernmental organisation

These are organisations established through private initiative to provide certain services to communities, specified groups of people, other organisations or its members. These organisations are autonomous, operate independently of government and corporate control and do not carry out

⁵² The term 'nonprofit' is accorded legal recognition by its use in the Nonprofit Organisations Act 1997 Act 71 of 1997, a South African statute.

⁵³ L. Salamon et al. (2000) op. cit. at 4.

their activities for profit or for political office.⁵⁴ In this work, the term is used as a form of the nonprofit organisation.

Public benefit activity

Public benefit is a term used to describe the work usually performed by nonprofit organisations. Often, the term is defined by reference to a list of specified activities. In South Africa, the Income Tax Act prescribes a list of public benefit activities.⁵⁵ In Nigeria, the operative words in relation to tax exemption for certain categories of nonprofit organisations are 'activities of a public character'. Further, the list of public benefit activities is usually adjustable, at the discretion of the appropriate authority. In South Africa, 'adult basic education and training' was added to the existing list of public benefit activities in 2000.⁵⁶ Organisations which engage in public benefit activities are described as public benefit organisations or public benefit associations. Public benefit organisations are distinct from mutual benefit nonprofit organisations which exist to serve the interests of the members of the organisation.

1.6 Outline of the Thesis

The thesis is divided into seven chapters. Chapter one is an introductory chapter stating the research problem and the justification for the research. It also sets out the methodology as well as the delimitations of the scope of the work and supplies a definition of key words and terminologies as they are used in the research.

In chapter two a theoretical framework is developed through an examination of theories on the nonprofit sector, in combination with theories of law and development. The growth of the nonprofit sector is attributed to various political factors including the imperative of exercising the freedom of association, the need to accommodate the needs of heterogenous populations,

⁵⁴ Adapted from definition in M. Mamdani and P. Otim, *Non-Governmental Organisations in East Africa: Report of a Survey of Training Needs* (Durban: Olive Organisation Development and Training Information Service, 1995) p.4.

⁵⁵ Income Tax Act 1962 as amended by the Tax Laws Amendment Act 2000, s.18(A).

⁵⁶ See Adult Basic Education and Training Act 2000.

the usefulness of the nonprofit agency for experimental projects and so on. The economic theories advance another set of reasons for the existence and work of the nonprofit sector, including undersupply of collective goods or social services by government, the lower cost incurred by nonprofits in responding to emerging demands, and the freedom of nonprofits to focus on a small segment of the population and charge fees for services, neither of which government could justifiably do. The Chapter then moves on to discuss the theories of alternative development and the basic needs theory which proffer a people-centred thesis of development, inevitably advanced through the mechanism of human associations at multiple levels. This twin field constructs a framework for the subsequent chapters that deal specifically with the growth of the nonprofit sector and the development of its legal environment in Nigeria and South Africa.

Chapter three describes the factors that influenced the growth and development of the contemporary nonprofit sector in Nigeria. The erosion of civil and political rights by a succession of military governments coupled with the neglect of social services led to the springing up of different kinds of associations at all levels, with the human rights organisation becoming the most visible, and thereby attaining the status of the archetype of the nonprofit sector in Nigeria. Earlier, external factors such as the recognition of rights at the international level by the United Nations seemed to spark off a corresponding agitation by nationalist movements concerned with issues of self-determination. Having described the way in which this history has shaped the contemporary nonprofit sector in Nigeria, the chapter then moves on to examine the current legal environment for the work of the nonprofit sector in Nigeria. This legal framework as configured for the purpose of this work, is constituted by legal provisions on freedom of association, registration and tax status of nonprofit agencies as well as issues of employment relations and law in the sector.

Next in chapter four, a corresponding study is done of the South African nonprofit sector. This shows how nonprofit organisations, especially those

involved in civil advocacy moved from a position of suspicion and close monitoring during the apartheid era to a position of relevance during the transition years, and ultimately to a position of legal empowerment by the entrenchment of the freedom of association and related liberties in the 1996 Constitution. Post-transition, the imperative of reforming the legal framework for the work of nonprofit organisations was vigorously pursued, resulting in the enactment of the Nonprofit Organisations Act in 1997 (NPO Act) and the Tax Laws Amendment Act 2000. This was useful in setting the stage for the new forms of responsibility that came to rest on the sector with the adoption of the Reconstruction and Development Programme (RDP) and subsequently the Growth, Employment and Redistribution Strategy (GEAR) by the post-apartheid government. The discourse on associational rights, registration, taxation, funding and roles of the nonprofit sector was completed by a discussion of the current employment law regime led by the Labour Relations Act 1995 as it applies to nonprofit sector employees.

In chapter five, a comparison is made of the two countries in respect of three main areas, namely growth factors, legal environment and trends in the nonprofit sector. This comparative analysis showed a number of similarities in the growth factors for the nonprofit sector in both countries, principally that of government failure manifesting in different ways. In South Africa, it was the exclusion of large sections of the population from the enjoyment of civil and political rights during the apartheid era, while in Nigeria, it was the excesses of the military state that led to a negation of civil and political rights and a degeneration of social services. It also emerged from the comparative analysis that while the respective constitutional provisions guarantee the freedom of association in both countries, the legal framework for the work of the nonprofit sector in South Africa is more advanced than that of Nigeria, given the success of the law reform in this area described in Chapter Four. Further, the large scale research conducted on the size and scope of the South African nonprofit sector in the late 1990s, created a generic picture of the nonprofit sector, an element missing from the Nigerian scene. The trends

show that funding shifts continue to occur in both countries, that government-nonprofit relations are not static, but dynamic and that staffing of the nonprofit sector is becoming more professionalised.

In chapter six, conclusions are made about the research, links are established between the findings and the theorisation on the subject of the nonprofit sector in the context of law in development. Distinct recommendations are made for South Africa and for Nigeria, with relevant lessons drawn from the practice in other countries. In particular, the usefulness of expanding the criteria of eligibility for tax exemption, the need to facilitate access to the benefits of the Nonprofits Organisation Act 1997 (NPO Act) by small organisations, the growth of a local funding base and the need for a government-nonprofit sector Compact were emphasised for South Africa. With regard to Nigeria, the South African NPO Act is recommended as a model to introduce a much needed clarity into the legal framework for the nonprofit sector. Other recommendations are for the creation of infrastructure organisations for the nonprofit sector in Nigeria as well as the conduct of generic research to determine the size and scope of the sector, preferably preceding any legal reform for the sector. The work concludes with a description of its usefulness for practice, future research and legal reform.

1.7 Conclusion

In this chapter, an overview of the thesis has been presented. The background shows that the nonprofit sector has become a subject of global interest, and that multidisciplinary research in the area is growing. Besides the worldwide growth of the sector, the diverse characteristics of nonprofit organisations also construct an identity for the nonprofit sector, which is not adequately addressed within mainstream studies of public sector and private sector organisations. The necessity of dedicated research into the nonprofit sector is thus reinforced. Further, the identification and description of the

grounds on which the research is based underscore the importance of legal research in the nonprofit sector.

Finally, the description of the way in which the research was conducted and the definition of words indicate the boundaries and limitations of the study, while the outline of the chapters suggest the contents and contribution of the work. In subsequent chapters, the ways in which the law contributes to the shaping of the sector are discussed. This legal discourse is placed within the context of the social, political and economic catalysts of nonprofit activity as the next chapter explores.

University of Cape Town

CHAPTER TWO

The Nonprofit Sector in the Context of Law and Development

2.1 Introduction

Chapter One gave the background of the study, describing briefly the difficulties of nomenclature in regard to the nonprofit sphere of activity, and mentioning some growth factors.¹ The research was justified on several grounds, most importantly, the relative absence of substantial research in previous studies into the ways in which law affects and shapes the activities of the sector, with particular reference to African countries. Also, in Chapter One, the methodology was outlined, showing a combination of literature review and empirical research, with South Africa and Nigeria as comparative case studies. The empirical component of the study was described, followed by a delimitation of the scope of the study. The outline of the thesis was given, placing the second chapter as the general literature review chapter, where a theoretical framework is developed for the research.

In this chapter therefore, some theories on the nonprofit sector are examined from a multidisciplinary perspective. In this regard, strains of political, economic and sociological explanations for the existence of the nonprofit sector are discussed. These are combined with perspectives from law in development to construct a theoretical framework for the study of the legal environment of the nonprofit sector, which brings up the rear in the chapter.

2.2 Theories of the Nonprofit Sector

The activities of organisations that are established for purposes other than making profit are prominent in different countries. The role of these organisations in development is often acknowledged, but the role of law in the development of these organisations is yet to attract substantial attention. In

¹ See Ch.1.1 *supra*.

order to understand the ways in which law contributes to the shaping of the nonprofit sector in character and structure, the reasons for the existence of the nonprofit sector first need to be identified. A number of theories have been proposed to determine the origins and explain the existence of the nonprofit sector, as is discussed next.

2.2.1 Political Theories of the Nonprofit Sector

Given that government provides an extensive range of services available to all citizens, at least in principle, it is curious that there still exists a need to supplement them, outside of the state framework. Even more significant is the fact that in an indirect way, government contributes to this alternative means by subsidizing the work of nonprofit organisations involved in service delivery. Political theories of the nonprofit sector seek to explain this state of affairs.

A major point of the political theorization on the nonprofit sector is that the freedom to form voluntary organisations to serve a public purpose is characteristic of democracies, and indicative of the state of a democratic society. This is illustrated, in the breach, by the tendency of totalitarian regimes to curb free trade unions.²

A second factor is that when state provision of public services is combined with voluntary provision, it makes it possible to accommodate the views and preferences of a greater range of the community than would be accommodated if state provision alone were available.³ In other words, '... what political power could ever carry on the vast multitude of lesser undertakings which ... citizens perform every day, with the assistance of the principle of association?'⁴ The diversity factor also features significantly in the economic analyses in nonprofit

² J. Douglas, 'Political Theories of Nonprofit Organisations' in Walter Powell (Ed.), *The Nonprofit Sector: A Research Handbook* (New Haven: Yale University Press, 1987) p.43 at 45 and 47.

³ Ibid.

⁴ A. De Tocqueville, *Democracy in America* op. cit. at 55.

sector studies, described by economists as 'differentiated demand', arising from the heterogeneous character of society.⁵

A key distinction between the provision of public services by the State and that provided by voluntary organisations is the power of government to invoke the coercive power of law through taxes to ensure the provision of services, a power which the nonprofit sector lacks.⁶ This is counterbalanced by legal checks and balances, regulation and restraint that ensure public accountability - a framework which is often missing from service provision by the nonprofit sector. These dynamics, described as constraints of 'political feasibility' and 'political justice' constitute a third political explanation for the existence of the nonprofit sector.⁷

With regard to political justice, the democratic principle of equality before the law demands that government justify its actions if it provides certain social services to a section of the population and not to others. On the other hand, the nonprofit organisation can limit its services to a scope of recipients it can afford. When therefore, government funds nonprofits for the provision of social services, the state ensures that some amount of social service is being provided, while avoiding the burden of public accountability for inadequate provision. In this way, the constraint of political feasibility is addressed in a way that does not attract the demands of political justice.⁸ This point is graphically conveyed in the following terms,

'For government to act, substantial segments of the public must be aroused, public officials must be informed, laws must be written, majorities must be assembled, and programs must be put into operation. By contrast, to generate a

⁵ E. James, 'Economic Theories of the Nonprofit Sector: A Comparative Perspective' in H. K. Anheier and W. Seibel (Eds.) *The Third Sector: Comparative Studies of Nonprofit Organisations* (Berlin/New York: Walter de Gruyter, 1990) p. 23.

⁶ B.A. Weisbrod, 'The Future of the Nonprofit Sector: Its Entwining with Private Enterprise and Government' in *Journal of Policy Analysis Management and Management* Vol.16, No.4, Fall 1997, p.543; see also Douglas, op. cit. at 46.

⁷ Douglas, op. cit. at 46.

⁸ Ibid.

*voluntary-sector response, a handful of individuals acting on their own or with outside contributed support can suffice.*⁹

A fourth reason advanced by political theorists for the existence of the nonprofit sector has to do with the openness of nonprofit organisations to trying new things. Democratic government is, by its very nature, averse to the risks that accompany experimentation in public service delivery and developmental projects, since public accountability demands that government act on certainties, not on hypothesis.¹⁰ As observed by J.S. Mill, 'Government operations tend to be everywhere alike. With individuals and voluntary associations, on the contrary, there are varied experiments, and endless diversity of experience.'¹¹

Usually, where an experimental effort by a nonprofit organisation records success in a particular project, government is more likely to follow suit. An example is the 'green revolution' which led to the development of new strains of wheat and rice that multiplied crop output per acre. Pioneered and funded by the Rockefeller Foundation and Ford Foundation in the late 1950s and early 1960s, it was subsequently adopted and financed by governmental and intergovernmental agencies worldwide and led to the creation of research institutes in countries such as Nigeria and Colombia.¹² The Carnegie Foundation has funded numerous research projects that have promoted standardization to professional training in different fields such as medicine, law, engineering, business, and the liberal arts in the United States.¹³

More recently, in the 1980s and 1990s, the Pew Charitable Trust created the Pew Center on Global Climate Change while the Avina Foundation pursues

⁹ L. Salamon, *Partners in Public Service: Government-Nonprofit Relations in the Modern Welfare State* (Baltimore: The Johns Hopkins University Press, 1995) p. 44.

¹⁰ Douglas, op. cit. at 48.

¹¹ J. S. Mill, *On Liberty*, quoted in L.M. Salamon, *America's Nonprofit Sector: A Primer* (2nd Ed., New York: The Foundation Centre, 1999) p.14.

¹² M. E. Porter and M. R. Kramer, 'Philanthropy's New Agenda: Creating Value' in *Harvard Business Review*, November – December 1999, p.125; see also Douglas, op. cit. at 48.

¹³ Porter and Kramer op. cit. at 125.

sustainable development through environmentally friendly business practices.¹⁴ Thus, the state may be willing to fund experimentation indirectly by making grants to nonprofits embarking on pilot or other experimental projects.

Although it is generally felt that the provision of public services through voluntary organisations is cheaper than direct delivery by government, which carries bureaucratic expenses, the corresponding economic cost to nonprofits is that of fundraising and carrying free riders.¹⁵ Moreover, the cost advantage found in the nonprofit sector is thought to be related to both lower labour costs and incomplete pricing. That is to say, the pricing of nonprofit delivery ought to, but often does not take into account or make provision for depreciation, the value of voluntary local inputs, transaction costs such as information and fundraising expenses, and long range recurrent costs which occur at project sites or to target groups.¹⁶ This debatable perception of nonprofit sector delivery as cheaper than government constitutes a fifth explanation offered for the existence of the latter.

Perhaps the most popular political theory for the existence and work of the nonprofit sector is its countervailing role of engagement with government policy and response to government performance. Often, the character of government failure which a nonprofit organisation seeks to address will largely determine the nature of its activity. If it is a capacity limitation need, a nonprofit agency can step in to provide a stop-gap measure based on local, national or international solidarity to support the individual rights of people. If on the other hand, it is a lack of political will, then the nonprofit organisation would tend to focus on advocacy, and 'the emphasis would then rest on pressurizing governments to change policy, rather than assisting these governments to

¹⁴ Ibid. at 125-6.

¹⁵ Douglas, op. cit. at 50. Salamon describes the 'free-rider' phenomenon as the act of enjoying or benefiting from public goods without sharing in the cost of providing them. Salamon (1999), op. cit. at 12.

¹⁶ H. Anheier, 'Private Voluntary Organisations and the Third World: The Case of Africa' in Helmut K. Anheier and Wolfgang Seibel (Eds.) *The Third Sector: Comparative Studies of Nonprofit Organisations* (Berlin, New York: Walter de Gruyter, 1990) pp 363-6.

maintain faulty or incomprehensive policies', which would be the case if the nonprofit organisation provided resources for areas ignored by government.¹⁷

In this way, nongovernmental organisations have become increasingly interested in the quality of government, since bad government in the end renders any bottom-up approach ineffective.¹⁸ Linked to this last point is the need to preserve pluralism and freedom in society, described by Salamon as follows:

*'Even if it were the case that government was far more efficient than the nonprofit sector in responding to citizen needs, Americans would thus likely still insist on a vibrant nonprofit sector as a guarantor of their liberties and a mechanism to ensure a degree of pluralism.'*¹⁹

The discussion will now turn to theories advanced by economists to explain the existence and growth of the nonprofit sector.

2.2.2 Economic Theories of the Nonprofit Sector

The expression 'third sector', alternatively used to describe nonprofit organisations, is essentially an economic term, the first and second sectors being government and the commercial or business sector. The term 'third sector' is reported to have been employed by economics scholars in the early 1970s, and was 'intended to express an alternative to the disadvantages associated with both profit maximization and bureaucracy by combining the flexibility and efficiency of markets with the equity and predictability of public bureaucracy.'²⁰ This alternative sector, constituted by nonprofit organisations which significantly manifested these characteristics became the third sector.

The thrust of economic theories of the nonprofit sector is the determination of which services will be produced by the nonprofit sector as

¹⁷ K. De Feyter, *World Development Law: Sharing Responsibility for Development* (Antwerp: Intersentia: 2001) p.224.

¹⁸ Ibid at 222.

¹⁹ Salamon (1999) op. cit. at 14.

²⁰ W. Seibel and H.K. Anheier, 'Sociological and Political Science Approaches to the Third Sector' in W. Seibel and H.K. Anheier (Eds.), op. cit. at 7.

distinct from government and the business sector, with an attempt to explain why. In so doing, they employ the variables of quantity, quality, cost efficiency and distributional equity to determine the utility of the production of these public goods by the nonprofit sector.²¹

From the perspective of economics, social service provision is viewed as an industry in which the public sector, the business or commercial sector and the nonprofit sector participate. When a service is provided by government for all, it is a public good, and when this service is provided through the private business sector it becomes a private good. As Weisbrod illustrates,

*'The collective good, lighthouse, has a private-good substitute, the shipboard radar; the collective good, provision of clean air, has private-good substitutes in air filters and purifiers for home, automobile and place of work; the collective good, stand-by fire department, has a private-good substitute, sprinkler systems; the collective good, generic information ... on drugs, has a private-good substitute, brand-name advertising; and the collective good, police department, has private-good substitutes that include alarms, locks, guards, and dogs.'*²²

While the advantage to the individual of government provision over private market provision is a lower cost, the private market provision has the advantage of increased individual control. It is at this point that the nonprofit organisation comes in to offer another collective consumption form of the good in a way that maximizes external benefits and social efficiency. In this regard, the nonprofit agency supplements government provision, and provides an alternative to private sector provision.²³ This is a key economic explanation for the growth of the nonprofit sector.

Secondly, some of the economic theories suggest that organisations that are not established primarily for profit tend to grow in 'service industries' where trust is an essential ingredient in settling for a service. In such situations,

²¹ James, op. cit. at 21.

²² B. Weisbrod, 'Toward a Theory of the Voluntary Non-Profit Sector in A Three-Sector Economy' in D. Gies, J. S. Ott, J. M. Shafritz (Eds.) *The Nonprofit Organisation: Essential Readings*, (Pacific Grove, California: Brooks/ Cole Publishing Company, 1990), p.28.

²³ Ibid. at 28-9.

nonprofit agencies are usually the preferred providers, for the reason that they are not primarily established to make profit.²⁴ For instance, where consumers of a service do not have adequate information to assess the quality of a service, the fact that a particular agency that provides that service does not distribute profits to members reassures consumers about the motivation for and thus the quality of the service. This is described as the non-distribution theory.²⁵ An example of this is in the provision of healthcare and personal care such as daycare and care of the elderly. Interestingly, while this view is described as the non-distribution theory, nonprofit organisations which provide such services have been classified as 'commercial nonprofits' because fees are paid for the service, even though profit is not distributed.²⁶

A third economic theory of the nonprofit sector, and perhaps one which answers the question more accurately for developing countries, describes nonprofit organisations as 'need-fillers', where a particular service required by a majority is undersupplied or that required by a minority is not readily available. This view sees the provision of services by the nonprofit sector as a market response to excess demand or differentiated demand arising out of heterogeneity in a society.²⁷ This theory belongs to a category which Salamon describes generically as market failure.²⁸ Put conversely,

*'The greater the homogeneity within a political unit - that is the greater the similarity in income, wealth, religion, ethnic background, education level, and other characteristics influencing demand for any collective-consumption good - the smaller the expected variation in individual demands and hence, the smaller the likely degree of dissatisfaction with the politically determined level and quality of output.'*²⁹

²⁴ Salamon (1999), op. cit. at 13.

²⁵ James, op. cit. at 22.

²⁶ H. Hansmann, 'Economic Theories of Nonprofit Organisations' in W. W. Powell (Ed.) *The Nonprofit Sector: A Research Handbook* (New Haven: Yale University Press, 1987), p.27 at 30.

²⁷ James, loc. cit.

²⁸ Salamon (1999), op. cit. at 12.

²⁹ Weisbrod (1990) op. cit. at 26.

A related concern of economists in studying the nonprofit sector, in developed countries at least, is the fact that government subsidy is a predominant source of the income which their nonprofit sector 'competitor' uses.³⁰ The main response to this appears to be the fact that nonprofit organisations may charge fees for their services, which government may not legitimately demand if they provide the same services. In other words, for the same expenditure by the state, more people are served through the nonprofit sector.³¹ This constitutes a fourth economic ground for the growth of the nonprofit sector.³²

A fifth factor has to do with the fact that the initial response to an emerging demand for collective goods rarely comes from the government. This is because the demand does not occur simultaneously so as to assume a priority for government, but grows as the need is felt by more individuals.³³ Consequently, provision of collective goods by voluntary organisations often precedes provision by government, and from the economic point of view, if 'undersatisfied demanders' turn to the nonprofit sector first to meet a need, then that sector develops.³⁴

Further, the transaction costs of mobilizing government response to shortages of collective goods are much higher than the costs of mobilizing voluntary action, making it 'reasonable to expect, therefore, that the private nonprofit sector will typically provide the first line of response to perceived "market failures," and that government will be called on only as the voluntary response proves insufficient.'³⁵

³⁰ James, *op. cit.* at 23.

³¹ *Ibid.* at 24.

³² This factor appears to be the reverse side of the political theory concept of political justice discussed in 2.2.1, *supra*.

³³ Salamon (1999), *op. cit.* at 15.

³⁴ Weisbrod (1990), *op. cit.* at 31.

³⁵ Salamon (1995), *op. cit.* at 44.

This theory is validated by the historical example from Elizabethan England which shows that charities were essentially the sole providers of certain public goods, such as schools, hospitals, fire fighting apparatus, public parks, bridges, docks, since these were all viewed as philanthropic activities.³⁶ In a similar vein, in the United States, such services were created as voluntary efforts and even after government began to get involved in the provision of these services, 'Americans were often reluctant to use them, fearing the rebirth of monarchy or bureaucracy.'³⁷

As has been seen, the narrative of economic theories of the nonprofit sector focus on efficiency issues in relation to recipients and cost issues in relation to government. Further, the economic approach tends to concentrate on organisations rendering direct services as distinct from organisations involved in civic and social activities. It is therefore important to highlight the sociological theorization on the nonprofit sector.

2.2.3 Sociological Theories of the Nonprofit Sector

While economic theories deal with the macro-economics analyses of demand and supply of services provided by the nonprofit sector, political science approaches describe the macro-political functions of the sector and sociological theorisations tend to highlight the mediating role of nonprofit organisations in terms of 'their ability to combine aspects of social and political integration with economic objectives.'³⁸

Block traces the origin of contemporary nonprofit activity to the organised forms of societal support that took root as ancient societies became more complex.³⁹ As states emerged and governments took shape, the plight of the less

³⁶ Weisbrod (1990), loc. cit.

³⁷ Salamon (1999) op. cit. at 11.

³⁸ Seibel and Anheier, op. cit. at 10.

³⁹ S.R. Block, 'A History of the Discipline' in D.L. Gies, J.S. Ott and J.M. Shafritz (Eds.) *The Nonprofit Organisation: Essential Readings* (Pacific Grove: Brooks/Cole Publishing Company, 1990) p.46 at 47.

fortunate members of society were addressed at different levels, by the state, the community and families, propelled by the influence of religious principles of giving and care of the less privileged.⁴⁰

Sociological theories emphasise the overlap between sectors, pointing out the tendency of government to use nonprofit sector organisations as think tanks and consulting institutions for policy formulation. Further, they maintain that it is difficult to draw lines between sectors since 'sectoral boundaries are far from constant and have become increasingly blurred.'⁴¹ Block observes that unlike the study of political science traced to Plato and Aristotle, or the field of medicine traced to Hippocrates, 'the lineage of nonprofit management is not as clear-cut and precise. [Its] ancestry ... descends from several areas.'⁴²

The sociological approach also tries to show how the character of a population affects the character of its nonprofit sector and the size of government. The example of Scandinavian countries is cited in support of the assertion that countries with relatively homogeneous populations tend to have a large government apparatus for meeting the wants of its citizens for various collective services.⁴³ On the other side of the coin, the growing importance of nonprofit organisations everywhere reflects the growth in diversity of demands with increasing migration and information exchange through information technology.⁴⁴

Sociological theories are also concerned with studying how the relationship between the state and the nonprofit sector is affected by the ways in which the latter has originated. Seibel and Anheier, for example, cite the German experience which shows a co-operation between government and a large section

⁴⁰ Ibid. at 47. Block cites the welfare provisions of the Babylonian Code of Hammurabi, Egyptian religious practices, pre-Christian Greek tradition and Judeo-Christian philanthropic injunctions, p.47.

⁴¹ Seibel and Anheier, op. cit. at 9 and 16.

⁴² Block, op. cit. at 46.

⁴³ B.A. Weisbrod, 'The Future of the Nonprofit Sector: Its Entwining with Private Enterprise and Government' in *Journal of Policy Analysis Management and Management* Vol.16, No.4, Fall 1997, p.542.

⁴⁴ Ibid.

of the nonprofit sector. This was partly because government had active control over the emergence of private welfare organisations in the late 19th and early 20th centuries, and partly because legal and financial autonomy had grown by a process which, although it came late, stressed compromise rather than confrontation.⁴⁵ The result of this co-operative relationship between government and the nonprofit sector was that the employment census of 1970 and 1987 in West Germany included data on the number of nonprofit sector organisations, the type, income, number of employees, and salaries for all those employing at least one person.⁴⁶ Statistics of this nature began to feature seriously in nonprofit sector studies in the United States in 1990s.⁴⁷

Sociological theorisation on the nonprofit sector has also grown around the interplay between other schools of thought such as the American micro-economic school and the neo-corporatist view. While the former views the nonprofit sector as a social response to a combination of market and state failure within the framework of institutional choice, or as an institutional option to reduce transaction costs, the latter perceives the nonprofit sector as a buffer zone between state and society, which mitigates social tensions and political conflicts.⁴⁸ The latter view reflects a perception of the nonprofit sector popular in countries undergoing transition from authoritarian rule and countries with new democracies.

Another rationale for nonprofit organisations that could broadly be classified as sociological is that they are typically started, not by individual entrepreneurs, but by religious or other ideologically motivated organisations, through the provision of services such as education, health and other vital social services, with a view to maximising adherents rather than profits.⁴⁹

⁴⁵ Seibel and Anheier, op. cit. at 11.

⁴⁶ Ibid. at 17.

⁴⁷ G. Rudney, "Employment Trends in the US Nonprofit Sector in *Voluntas* Vol 4 No.2, August 1993, p. 197.

⁴⁸ Seibel and Anheier, op. cit. at 13.

⁴⁹ James, op. cit at 23.

The theoretical discourse on the origins, growth and development of the nonprofit sector will be followed by a discussion of the nonprofit sector in the context of developing societies, with an emphasis on African countries.

2.3 The Nonprofit Sector in an African Context

Critiques have been offered of some of the theories discussed above, especially in relation to developing countries. These critiques are generally informed by the limitations of theories constructed around a particular political and socio-economic reality in explaining the origins of nonprofit organisations in a different environment.

First, the non-distribution theory is considered unsatisfactory in explaining the phenomenon of the nonprofit sector in other parts of the world where 'competition' in the provision of public services is not necessarily between the nonprofit sector and the business sector, as much as it is between the nonprofit sector and governments. In relation to the nonprofit sector in Africa, or other parts of the developing world, 'competition' may not be an appropriate term to use as the services are grossly inadequate and unevenly spread in the first instance.⁵⁰ Further, the theory does not explain the wide variations in the type of organisations comprised in the nonprofit sector in different countries.⁵¹

Another critique challenges the narrow 'ahistorical' focus which tends to see the presence of voluntary organisations in Africa as a recent thing that has arisen in response to the socio-economic malfunction of African countries, rather than a phenomenon predating many African states.⁵² Thirdly is the failure to engage with the internal and external changes in the organisational environment of nonprofits as well as to consider the effect of the larger political economy within which it exists.⁵³

⁵⁰ Ibid. at 22.

⁵¹ Ibid. at 23.

⁵² Anheier, op. cit. at 367-8.

⁵³ Ibid.

In African societies, the civil society construct is influenced by the predominance of kinship values which tend to obscure and restrict individual rights and liberties.⁵⁴ This African civil society is found in traditional ethnic organisations that promote civic values as distinct from 'elite-controlled cosmopolitan groups that enjoyed communication links and proximity with foreign donor agencies.'⁵⁵

Further, significant developments in national economies carved out new roles for nonprofit organisations. Around the period of the end of the cold war, many African governments shifted from centralized large-scale planning which was often monopolized by the state to a more decentralized system of development. This led to the rechanneling of development finance to voluntary organisations, and thus induced a growth in nonprofit development organisations.⁵⁶

Furthermore, the perception of nonprofit organisations as having more relevance in meeting the needs of people who are not reached by conventional state public service delivery systems is disputed to some extent. While this capacity may exist in the very informal and grassroots character of some nonprofit organisations, it is not necessarily so in respect of many others. A case in point is presented by a sample of communities in Senegal, Togo and Nigeria which questioned assumptions about the participatory character of certain nonprofit development organisations.⁵⁷ The research showed that some non governmental development organisations (NGDOs) did not show the cultural sensitivity acclaimed as a key strength of grassroots development organisations. Instead of nurturing local organisations within their indigenous context,

⁵⁴ P. Ekeh, 'Civil Society and the Construction of Freedom in African History' in E. Onwudiwe (Ed.), *African Perspectives on Civil Society* (Ohio: Central State University, 1998) p. 27

⁵⁵ E. Onwudiwe, 'Civil Society: A Definition and an African Perspective' in (E. Onwudiwe Ed.) *African Perspectives on Civil Society* (Ohio: Central State University, 1998) p.14, footnote 6.

⁵⁶ Anheier, op. cit. at 362-3.

⁵⁷ Ibid.

enhancing already existing projects, and involving target recipients in project formulation, they rather 'instigated' projects and carried them out.⁵⁸

A discourse on the growth of indigenous human rights organisations in Africa in the 1990s links this phenomenon up to an increased respect for the rule of law.⁵⁹ This highlights how the opening up of political spaces created an impetus for rights promotion activities in ways that necessitated the setting up of dedicated human rights organisations.⁶⁰ This distinct political factor which, in a sense, is the reverse side of the government failure theory, is more common to the nonprofit sector in the developing world. This factor is not emphasised in traditional political theories on the origins and growth of the nonprofit sector.

Similarly, the economic argument of efficiency as well as the political argument that nonprofit organisations are immune to changing political tides have also been questioned. For example, in Mali, certain nonprofit organisations were found to have been set up by people who simply found themselves unemployed, such as retrenched government workers and recent graduates unlikely to find employment in government or the business sector.⁶¹ In this way, many nonprofit organisations were primarily an expression of the employment needs of people or 'the result of local entrepreneurship that, for one reason or another, cannot be realized in other sectors of the economy.'⁶² This finding is supported by the following statement on nonprofit organisations in developing countries.

'... the sharp increase in resources directed to the NGO world has directly spawned many new organisations in Southern countries, and a new concept of "opportunistic NGOs" has entered the language. Many of these new organisations are driven by the hunt for money and employment before anything else; they are often started by unemployed professionals, increasingly casualties of

⁵⁸ Ibid. at 367.

⁵⁹ C. Welch Jr., Human Rights and Development in Africa:NGOs' in P.T. Zeleza and P.J. McConaughay (Eds.) *Human Rights, The Rule of Law, and Development in Africa* (Philadelphia: University of Pennsylvania Press, 2004) pp.201-2.

⁶⁰ Ibid.

⁶¹ Anheier, op. cit. at 364.

⁶² Ibid.

*the brutal reduction of the state sector. They will operate as sub-contractors for any job, and have little inherent commitment to, or experience in, working with grass roots communities They feed particularly off the increasing demand for INGOs to take over areas of basic service provision. They are a logical response to the presence of resources in a climate of increasing structural middle class unemployment. But they bring in very different qualities and relational aspects to the sector, and they are particularly vulnerable to donor pressures and agendas.'*⁶³

It is also noteworthy that the dimensions in which nonprofit organisations have profited local communities are quite often indirect and incidental rather than direct and deliberate. For instance, research in West Africa showed that the peculiarities of insufficient and unreliable funding, delays in grant processing, personnel shortages and lack of planning hampered the continuity of projects. Rather 'the majority of economic benefits seemed to derive from the NGO presence in the village as such ... employment, construction ... and only secondarily because of project results.'⁶⁴

Incidental to the study of the origins of nonprofit organisations in African countries, but increasingly relevant to their existence and activities is the tendency of authoritarian governments to take over the visible and politically relevant associations of civil society, while those who manage to remain 'irrelevant' are tolerated by the authorities. A clear example of this is the brazen take-over of trade unions and professional associations by successive military governments in Nigeria through the proscription and curtailment of their activities by means of military decrees purporting to 'streamline' their operations and prevent duplication.⁶⁵ This tendency of governments to exploit the agenda of civil society associations is not limited to nonprofit organisations in developing countries. In the developed countries of the west, the motley range of economic and social attributes of nonprofit organisations gave politicians

⁶³ D. Harding, *From Global to Local: Issues and Challenges Facing NGOs* (Durban: Olive Information Service, AVOCADO Series, 1994) p.23.

⁶⁴ Anheier, op. cit. at 364-5.

⁶⁵ See G.O.S. Amadi, *A Legal Guide to Trade Unions* (Nsukka: Afro-Orbis, 1999) p. 23.

room to support those that fit into their critique and interpretation of the 'welfare state in crisis.'⁶⁶

The foregoing notwithstanding, western scholarship on the subject of nonprofit organisations has not been homogenous. While American scholars have tended to focus on the role and contribution of voluntary organisations in a democratic society, European scholars emphasise its function in serving conservative goals in the nineteenth Century.⁶⁷

In a sense the theories on the nonprofit sector are as varied as the organisations and activities within the sector, and while western theories may not offer a complete explanation of the origins and rationales for the existence of the nonprofit sector in developing countries, they do resonate with the theme of private initiative which underlies much of nonprofit activity. It is at this point, considered necessary to highlight some theories of the role of law in the process of development as a precursor to discussing the ways in which law has influenced the development of the nonprofit sector.

2.4 Theories of Law in Development

As observed by a senior UN official, '[i]t has long been recognized that law and development have intricate interrelationships, that the law has a role to play in advancing development objectives, while the latter, in turn, may have an impact on the evolution and application of the law.'⁶⁸ Invariably, for development policy to achieve its end, namely that of generating development, economic and political analyses need to create the foundation for an 'appropriate legal regime'.⁶⁹ The intersection of law with development processes occurs at

⁶⁶ Seibel and Anheier, op. cit. at 8.

⁶⁷ Ibid.

⁶⁸ B.G. Ramcharan, 'The Role of the Development concept in the UN Declaration on the Right to Development and in the UN Covenant' in P. De Waart, P. Peters and E. Deters (Eds.) *International Law and Development* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, Kluwer, 1988) p.295.

⁶⁹ D. Kennedy, 'Laws and Developments', Ch.2 of J. Hatchard and A. Perry-Kessaris (Eds.), *Law and Development: Facing Complexity in the 21st Century* (London: Cavendish Publishing Ltd., 2003) p.19.

numerous points, a number of which have been identified and discussed by scholars of law in development, as is discussed next.

2.4.1 Theory of Alternative Development

Leading law in development theorists have focused much attention on the ways in which law, in its various forms and sources, impact on development processes, concluding that although it has the potential to promote self-reliance and more equitable allocation of resources, it more often perpetuates the cycle of poverty, exploitation and exclusion.⁷⁰ This reality influenced the human development approach adopted by the UN as a response to the shortcomings of the traditional equation of development with economic development only.⁷¹

Taking the position that state-managed development programmes are creatures of law as well as political economy and ideology, Paul and Dias identify six areas in which law plays a major role. These are the design and enactment of programs, the creation of institutions to carry out development programs, the selection and control of actors who exercise the powers given to these institutions, the articulation of these powers given to institutions and delegated to actors, the prescription of processes and procedures for the exercise of these powers, the establishment of structures for review of decisions made in the exercise of these powers and for securing accountability of actors, institutions and reform programmes.⁷² While this list does not specifically address the role of the private nonprofit organisation in development, it is worthwhile to consider the context in which it was constructed.

In respect of rural development in particular, a variety of legal sources affect development programmes. These include primary sources such as organic

⁷⁰ J. C.N. Paul and C. J. Dias, 'State-managed Development: A Legal Critique' in Anthony Carty (Ed.) *Law and Development* (The International Library of Essays in Law and Legal Theory, Legal Cultures 2 (Aldershot: Dartmouth Publishing Company, 1992) p.286.

⁷¹ De Feyter, op. cit. at 4.

⁷² Paul and Dias, (1992a), op. cit. at 279-92.

statutes, subsidiary legislation and constitutional provisions, secondary sources such as administrative rules and directives and unwritten principles of public law drawn from constitutional practice, international sources such as human rights instruments and judicial sources set out in case law. The circumscribed space created by the application of these sources of law on development processes is however widened by the creation of rights of participation in the formulation of development plans which go beyond the assumption that the parliamentary system provides vehicles for effective participation.⁷³

Alternative development theorists maintain that not merely the framework of government, but 'development must be by people, not only for them. People must participate fully in the decisions and processes that shape their lives.'⁷⁴ In this respect, rights of people to participate in their development may be formulated around a variety of legal obligations. For instance, a requirement may be created for legislative proposals to be publicised, with opportunities for public discussion in accessible forums. Further, public commissions representative of the disadvantaged may be established to review programmes, formal recognition may be accorded popular organisations to be heard in ministries and other executive agencies where key policies are made, and rights of access to the media may be provided.⁷⁵

Expanding on traditional concepts of development, the UN Human Development Report 1995 identified four components of development as productivity, equity, sustainability and empowerment. In this expanded definition, the *equity* component brought the gender dimension in, while empowerment brought in principles of participation in decision making by those affected. The *sustainability* factor reinforced the environmental imperative of pursuing development within the capacity of nature, while also emphasizing the

⁷³ Ibid. at 280.

⁷⁴ De Feyter, op. cit. at 4.

⁷⁵ Paul and Dias (1992a), op. cit. at 284.

importance of considering the effect of economic decisions on future generations.⁷⁶

As progressive as this redefinition of development seems to be, the proponents acknowledge that 'promises of participation - legal and otherwise - will do little to help the very people who are supposed to be empowered unless they enjoy rights to participate through organisations.'⁷⁷ This approach is a departure from the modernization theory of development which presumed a predetermined linear economic progression common to all states, and which formed the centre of earlier theories of law in development as critiqued by Perry.⁷⁸

In the alternative development paradigm, the first identified task in development efforts is to help people form their own organisations, and to help these groups play a much more pervasive, dynamic role in the design and administration of development. In this regard, people must be mobilized and helped by support groups to use new legal rules and resources, as neither the legislature nor the judicial process will activate these resources on their behalf⁷⁹ The complementary side of this is that 'legal processes will normally succeed to the extent that they are not complex or arbitrary, are based on a system of consultation with the people affected by them and are realistic in their reliance on existing institutions.'⁸⁰

Following from this, a theory of alternative development is set forth, drawing from the rights of people to form non-state organisations through which to engage in economic development, as well as the rights of groups to participate

⁷⁶ De Feyter, op. cit. at 5.

⁷⁷ Paul and Dias (1992a), loc. cit.

⁷⁸ A. J. Perry, 'International Economic Institutions and the Modern Law and Development Movement' Ch.2 in A. Seidman, R.B. Seidman and T.W. Walde (Eds.) *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance* (The Hague: Kluwer Law, 1999) p.21.

⁷⁹ Paul and Dias (1992a), op. cit. at 296.

⁸⁰ I.F. Shihata, 'Good Governance and the Role of Law in Economic Development' in A. Seidman, R. Seidman and T.W. Walde (Eds.), *Making Development Work, Legislative Reform for Institutional Transformation and Good Governance* (The Hague: Kluwer, 1999) p.xx.

in the design and administration of rural development.⁸¹ This is predicated on the fact that reliance on governments to meet needs for organisational resources is often unrealistic as much as on the principle that government monopolization of the development process is antithetical to core concepts of participatory development. A multiplicity of actors is identified for the process of participatory development.⁸² These include, at the international level, the major economic powers and international organisations, and at the local level, the private sector and the nonprofit sector.⁸³ Indeed, the nongovernmental organisations are seen as better positioned for the task of providing organisational resources to grassroots organisations.⁸⁴

These observations highlight three ways in which the law impacts on the development process, first, by establishing regulatory frameworks for development programmes, secondly by creating and protecting rights of participation, and thirdly, by developing a conducive environment for formal organisations of civil society to take root and grow. It is the combination of the second and third roles that are at the heart of the present work.

2.4.2 Basic Needs Theory

The basic needs theory is similar and linked to the alternative development model in the sense that it promotes a people centred development over non-comprehensive economic development models. This view involves some co-ordination between the economic objectives and the constitutional order of a developing society. The basic needs approach studies the effect of economic growth on marginalized groups of people. It commences with the formulation of development policy by analyzing the precise character of economically and

⁸¹ J.C.N. Paul and C. J. Dias, "Alternative Development: A Legal Prospectus" in Anthony Carty (Ed.) *Law and Development* (The International Library of Essays in Law and Legal Theory, Legal Cultures 2 (Aldershot: Dartmouth Publishing Company, 1992b) pp.305-16.

⁸² Paul and Dias (1992b), op. cit. at 305-16.

⁸³ De Feyter, op. cit. at 309.

⁸⁴ Paul and Dias (1992b), op. cit. at 309.

socially underprivileged groups, in order to define a poverty line, and continues by asking why the needs of such people are not met. The result of this is a highly decentralized planning process, based on the local community, involving local participation and answering local problems.⁸⁵

Slinn refers to this transformatory function of development policy and law in his analysis of French jurisprudence on Law in Development, which advocates that a body of law, which historically may have appeared as an instrument of oppression, may now serve as an instrument of social and other reform, promoting the 'basic needs' of the disadvantaged.⁸⁶

A 'basic needs' perspective may demand, in relation to a workplace community for example, the observance of essential health and safety standards, the protection of wages, the freedom of association, the provision of housing and public utilities.⁸⁷

The spirit of the basic needs approach is captured in the United Nations Charter which calls on member states to promote 'higher standards of living, full employment, and conditions of economic and social progress and development.'⁸⁸ This provision and other similar ones contained in the Universal Declaration on Human Rights are described as 'seeds of economic, social and cultural rights'.⁸⁹ Seeds, which, it might be added, are watered by the basic needs approach to development.

The basic needs approach avoids some catches in classical legal analysis, such as the practice of placing general needs of business and economy above basic human needs in economic law.⁹⁰ This catch is one that scholars from the

⁸⁵ P.T. Muchlinski, ' "Basic Needs' Theory and 'Development Law"' in F. Snyder and P. Slinn (Eds.), *International Law of Development: Comparative Perspectives* (Abingdon, Oxon: Professional Books, 1987) p238.

⁸⁶ Slinn, op. cit. at 29.

⁸⁷ Muchlinski, op. cit. at p.247.

⁸⁸ Art. 55(a).

⁸⁹ N.J. Udombana, 'Socio-Economic Rights and the Nigerian Worker' in *Modern Practice Journal of Finance and Investment Law* Vol.3, No.2 (1999) p.402.

⁹⁰ Muchlinski, op. cit. at 241.

developing world are constantly trying to inject into the development discourse, as described in the following statement:

*'It is clear ... that development is a total experience which impacts on all aspects of national life. It is much more than economic development to which it is reduced in daily discourse. Economic development is at best a means to an end, that is, using the benefits of economic development to ensure the qualitative transformation of the society and its peoples.'*⁹¹

One might add that it is at this stage of the development process, between the achievement of economic gain and the use of it for transformation, that a lot of nonprofit activity is located.

Further, the basic needs theory bypasses the traditional separation between international and national jurisdiction, which can work against the adoption into national law of the norms of 'development law' originating in international instruments.⁹² In this way, the basic needs approach operates as a political theory of justice, representing an attempt to build a new political consensus around which a new kind of law can emerge.⁹³

The need for information and human resources to help people make self-reliant judgments at individual and organisational levels are also seen as basic needs, and 'the rights of some people to seek and others to provide resources to satisfy these needs must be seen as essential human rights, which make possible the realisation of other human rights.'⁹⁴ The thesis of the basic needs approach is summed up as follows,

'While the 'basic needs' theory accepts that class relations, founded on international capitalist relations of production, are a cause of underdevelopment, it does not accept the Marxist position that such relations are immutable and that the destruction of the capitalist system is the only solution. Instead the 'basic needs' approach is reformist in nature and argues that if development occurred

⁹¹ F. Adewunmi, 'Workers' Participation in the Development Process: Issues and Options' in F. Adewunmi (Ed.) *Trade Unions, National Development and Military Rule* (Lagos: Friedrich Ebert Foundation and the Organisation of African Trade Unity, 1998) p.23.

⁹² Muchlinski, loc. cit.

⁹³ Ibid. at 2.

⁹⁴ Paul and Dias (1992b) op. cit. at 308 and 318.

*within a politically accountable, pluralistic and decentralized form of state, a free market economy could be controlled for the gain of the poor.'*⁹⁵

In sum, it is submitted that the basic needs theory of law and development may be described as the other side of, or at least, a stage in the alternative development model, compatible with the process of people-centred development.

2.5 The Nonprofit Sector in the Context of Law and Development

Theories of law in development are not directed at explaining why people form nonprofit organisations. Rather, they identify associational life as an essential by-product of the quest and the right of people to development. This right was further entrenched by the United Nations Millenium Declaration⁹⁶ which is described as having adopted human development as the true measure of the progress of nations and as the preferred development outcome.⁹⁷

*"Perhaps recognizing that democracy is a mere rule of majority over minority, the Declaration provides also a reference menu of values thought as "essential" in the 21st Century. These are freedom, equality, solidarity, tolerance, respect for nature, as well as shared responsibility"*⁹⁸

From this perspective therefore, grassroots associations of civil society are not denoted by their nonprofit status, as much as by the solidarity they offer to their members and communities. A generalized categorisation typical of the way in which the law in development literature brushes at the subject is given by Paul and Dias in classifying local associations. They observe that 'some are small and rooted in tradition; some simply provide organisational forms for mutual self-help, savings or construction of desired community facilities; some have evolved into vehicles of protest; some are in overt opposition to governments of the day',

⁹⁵ Muchlinski, op. cit. at 239.

⁹⁶ <http://www.un.org/millennium/declaration/ares552e.htm> accessed on 21/12/05.

⁹⁷ See the *World Public Sector Report 2003 – E-Government at a Crossroads* (UN Dept. of Economic and Social Affairs, New York, 2003) p.5.

⁹⁸ Ibid. at 6.

and conclude that the law works through these dynamics 'by recognizing the essential rights of people to form organisations and use them to pursue economic and political purposes.'⁹⁹

In this context, the role of the development lawyer is identified as essentially two-fold. First, to place at the disposal of policy makers instruments and legal concepts, as suitable as possible, on which one can rely in discussions and negotiations. Secondly, to contribute to the academic analysis of legal norms especially by trying to adapt the process of formation of norms in a way that preserves any useful potential of its technical quality.¹⁰⁰ This is all the more imperative in developing societies when it is considered that inadequate legal processes and widespread corruption may be as much a cause of underdeveloped physical and educational infrastructure as it is a result of it.¹⁰¹

Another peculiarity of the nonprofit sector in developing countries is that contrary to the ideal situation where state and civil society institutions co-operate to realize a development project owned by all relevant parts of society, government relationship with civil society organisations in developing countries is often, though not always, characterized by suspicion and antagonism.¹⁰²

The observation by law in development scholars that relying on governments to meet needs for organisational resources is often unrealistic corresponds with the economic theories of government failure as a reason for the growth of the nonprofit sector.¹⁰³ Further, the recognition of the importance of progressive tiers of associational activity for development resonates with the

⁹⁹ Paul and Dias (1992b), op. cit. at 304-5.

¹⁰⁰ M. Flory, 'A North-South Legal Dialogue: The International Law of Development' Snyder and Slinn, op. cit. at 21.

¹⁰¹ C. W. Gray, 'Reforming Legal Systems in Developing and Transitional Countries' in A. Seidman, R.B. Seidman and T. Walde (Eds.), *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance* (The Hague: Kluwer Law International, 1999), p.62.

¹⁰² De Feyter, op. cit. at 222.

¹⁰³ See Paul and Dias (1992b), op. cit. at 310; see also Salamon (1999) op. cit. at 13. See also discussion in 2.2.2.

economists' postulation of a multi-level government arising as a result of unmet needs of communities.¹⁰⁴

The recognition of the right to development and the current redefinition of development by scholars has brought some new dimensions into the development discourse. The right to development is provided for in Article 1(1) of the United Nations Declaration on the Right to Development¹⁰⁵ as follows:

'The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.'

This provision is reinforced by the provision that 'States should undertake, at the national level, all necessary measures for the realization of the right to development. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.'¹⁰⁶

However, by channeling issues of development and the calls for reform in international economic law into the programmes of international organisations, the western powers avoid direct state action and contain the transformatory campaign of less developed states.¹⁰⁷ These international intergovernmental organisations then carry out the deflected mission of government through local nonprofit organisations in the areas where they operate. This seems to be a manifestation of government failure at the international level, a situation that would support economists' theory of government failure as a factor for the growth of the nonprofit sector.¹⁰⁸

The discourse seems to converge on the centrality of organised activity at the local level to address the problems of state-managed development

¹⁰⁴ See Paul and Dias, loc. cit.; see also Weisbrod (1990), op. cit. at 27.

¹⁰⁵ Resolution 41/128 of 4 December 1986 accessed at <http://www.unhchr.ch/html/menu3/b/74.htm> on 21/1/2006.

¹⁰⁶ Articles 8.1 and 8.2 respectively.

¹⁰⁷ Muchlinski, op. cit. at 242.

¹⁰⁸ See discussion in 2.2.2.

administration. Only through organisation and support from other groups can the prime targets of development, that is the poor and disadvantaged, hope to secure the benefits of governance, even within a democracy. Such benefits include participation in the processes of design, access to and accountability from local officials, proper audits of public bodies, invocation of the remedial powers of the courts, access to the legislature or to investigative commissions."¹⁰⁹

The creation of an effective legal system that promotes development will require a recognition of plural forms of legal administration and an optimal utilization of the opportunities offered by both. For example, legal rules can be enacted by the legislature and enforced by the police, the judiciary and other specialized agencies and regulatory bodies. In turn, disputes can be resolved by courts or private arbitration, and each of these can be organised, staffed and run in many different ways.¹¹⁰ It is submitted that legal processes in developing countries are weak in the kind of plurality and efficiency described here, and consequently need external, non-state impetus, which the nonprofit sector provides, to develop and consolidate. Rather, what obtains is a scenario where the role of law is confined to legitimising the actions of a strong centralised government reducing it to a vehicle for the exercise of authority by government more than an instrument of accountability.¹¹¹

A development-friendly legal system should possess the key elements of simplicity of procedures, transparency of legal processes, participation of the affected people and accountability of the public officials, all of which add to the legitimacy of the rules and contribute to the public's confidence in the legal framework as a whole.¹¹²

¹⁰⁹ Paul and Dias (1992a), op. cit. at 296.

¹¹⁰ Gray, op. cit. at 63.

¹¹¹ D. Webb, 'Legal System Reform and Private Sector Development in Developing Countries' in A. Seidman, R.B. Seidman and T. Walde (Eds.), *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance* (The Hague: Kluwer Law International, 1999) p33 at 35.

¹¹² Shihata, op. cit. at xx.

Three steps are identified in the task of developing a sound legal system in developing and transition countries. These are first, creating laws that clearly set out individual responsibility and incorporate market friendly economic policies; secondly, establishing a broad set of supporting institutions and thirdly, the creation of incentives for individual market participants to take full advantage of their legal rights as well as the information and enforcement capacity provided by supporting institutions.¹¹³

Supporting institutions in the context of the above developmental recipe include formal governmental structures such as the judiciary and the police, as well as other semi-formal institutions which provide information essential to law enforcement and successful policy implementation. These institutions which play a complementary as well as watchdog role in relation to the formal institutions and the business sector include alternative dispute resolution institutions, human rights associations, the press and the private bar.¹¹⁴ As Gray goes on to observe,

*'When they [watchdog institutions] work well, as in mature market economies, these institutions tend to be taken for granted. When they do not, they are sorely missed. The state's role in creating and supporting those watch-dog institutions varies and in many cases is rather limited. If private sector watch-dog institutions are to be successful, they need to arise in large part to meet social demand rather than being imposed from above by bureaucrats.'*¹¹⁵

This observation reinforces the demand-centred economic theory of the origins of the nonprofit sector, but like other development theories, stops short of proceeding to discuss the legal environment required for these watchdog institutions to function well. It is submitted that a subject identified as central to the working of society, business and government deserves more research attention. Thus, the next section will be devoted to considering the principles

¹¹³ Gray, op. cit. at 63-6.

¹¹⁴ Shihata, op. cit. at xxi; see also Gray, op. cit. at 65.

¹¹⁵ Gray, loc. cit.

that should inform the development of a conducive legal environment for the nonprofit sector.

2.6 The Legal Environment for the Nonprofit Sector

The right of association is at the heart of civil society activity which nonprofit organisations represent. This right may be inherently granted in common law countries as a product of rights provided in other laws and case decisions while in civil law countries it must be directly expressed in statutory law.¹¹⁶ While legal regulation may be desirable for associations of civil society, it must be done in a way that empowers the nonprofit sector, as any government attempt to 'tidy up' the nonprofit sector by preventing duplication or other such measure can easily go against democratic norms such as the freedom of association.¹¹⁷ As De Tocqueville observed,

*'No sooner does a government attempt to go beyond its political sphere and to enter upon this new track than it exercises, even unintentionally, an insupportable tyranny; for a government can only dictate strict rules, the opinions which favors are rigidly enforced, and it is never easy to discriminate between its advice and its commands.'*¹¹⁸

The legal issues around associational rights in the context of the nonprofit sector are further complicated by the intricacies of development financing where 'at each step in the funding chain, the money meets different legal and accounting environments, and different organisational interests, but also funding flows from other private or official sources.'¹¹⁹ This complexity in funding networks tends to present a real constraint to ensuring ownership of development activities by beneficiaries.¹²⁰

¹¹⁶ P. Ferraro, *Legal and Organisational Practices in Nonprofit Management* (The Hague: Kluwer Law International, 2000) p. 29.

¹¹⁷ Douglas, op. cit. at 52.

¹¹⁸ De Tocqueville, op. cit. at 56.

¹¹⁹ Anheier, op. cit. at 372.

¹²⁰ De Feyter, op. cit. at 221.

Further, while the term 'private nonprofit' appears to be an unambiguous legal category, the public-private breakdown of funding and management is much more mixed and continuous, and in reality, nonprofit organisations are a public-private hybrid - a fact which makes the analysis of these organisations complex.¹²¹

It is perhaps for these reasons that the subject of the legal environment for the nonprofit sector did not receive in depth scholarly attention until the 1990s. However, since then, scholars of the sector have increasingly noted the imperative of defining the law in this area of human activity with greater clarity.¹²² Moreover, given the increasing level of cross-border work, the shared characteristics of public benefit activity and the trans-national character of donor funding, the necessity for legal clarity extends beyond national laws and makes a measure of harmonization, or at least, modelling between nonprofit laws of various countries desirable.¹²³

In this respect, nonprofit sector scholars offer a variety of approaches and suggest areas of immediate concentration. Salamon and Flaherty distil ten priority issues for legal attention. These are the overall legal context, including protections for the right to associate, eligibility for nonprofit status, internal governance requirements and tax treatment of organisations and their income. Others are restrictions on personal benefits, organisational obligations to the public, such as reporting and other requirements, permissible business activity and key outstanding issues affecting the sector.¹²⁴

Ferraro makes a multi-pronged case for a comprehensive 'framework' legislation on several grounds. First, the growth of the sector makes it necessary

¹²¹ James, op. cit. at 25.

¹²² See L. Salamon and S. Toepler, *The Influence of the Legal Environment on The Development of the Nonprofit Sector* (The Johns Hopkins University Centre for Civil Society Studies Working Paper Series No.17, 2000); T. Silk, 'The Legal Framework of the Nonprofit Sector in the United States' in *The Josey-Bass Handbook of Nonprofit Leadership and Management* (San Francisco: Jossey-Bass Publishers, 1994),

¹²³ Ferraro, op. cit. at 25-6.

¹²⁴ L. Salamon and S. Flaherty, 'Nonprofit Law: Ten Issues in Search of Resolution' in L. Salamon and S. Toepler (Eds.) *The International Guide to Nonprofit Law* (New York: John Wiley & Sons Inc., 1997)p.8.

to provide an accessible, simple and easy to implement legal framework. Secondly, where nonprofit organisations are governed by different laws, the risk is run of similar organisations being treated unequally under the law, in several respects, including eligibility for tax benefits or other fiscal regulations, especially where a particular law is not up to date. Thirdly, grassroots organisations, with whom much of the literature on development is concerned, may not be able to afford the legal expertise needed to identify legal provisions that affect them from a variety of laws.¹²⁵

Silk describes the progressive way in which legal provisions become increasingly relevant as a nonprofit activity proceeds from the status of an unincorporated association to a registered association. In particular, the issues surrounding the form of organisation to adopt are highlighted, with the conclusion that the nonprofit corporation has virtually replaced the unincorporated form of association and the charitable trust as the entity of choice for new nonprofit organisations.¹²⁶ This is mainly because the unincorporated form contains few rules that offer little protection to practitioners and leaves many operational questions unanswered, while the charitable trust is largely a creature of case law which often lacks the certainty of statutory law. The advantage of the corporate form for nonprofit organisations on the other hand, is that '[m]odern statutory rules governing organisational formation, operation, and termination contain protections against liability and provide comprehensive legal guidance to the directors and members of nonprofit corporations.'¹²⁷

While therefore, Salamon and Flaherty draw attention to the legal issues to be addressed in nonprofit sector studies, Silk's approach suggests the need for a clear compendium of multiple statutory sources while Ferraro advocates one comprehensive primary legislation for nonprofit organisations.

¹²⁵ Ferraro, *op. cit.* at 25-8.

¹²⁶ Silk, *op. cit.* at 71.

¹²⁷ *Ibid.*

The relative novelty of the framework legislation model makes it useful to describe it in some more detail. In the framework legislation model, key terminologies would be defined to link provisions for broad categories of nonprofit organisations under the same law. For example, where the classification of certain nonprofit organisations as public benefit organisations and mutual benefit organisations is adopted, these and other classifications can be provided for under the same law, by first defining each term, and then making appropriate provisions for them accordingly.¹²⁸

It is expected that a framework legislation will require a statutory body for its administration. This brings to mind an earlier proposal, with particular reference to the United States, for an independent agency to be entrusted with all non-tax related matters of nonprofit organisations, as a 'strategy of last resort' to introduce desired regulation to the nonprofit sector.¹²⁹ The difference between this and the framework legislation model is the exclusion of tax matters from the ambit of such a law.

Four principles are identified as essential to a framework legislation. These are first, that such legislation should provide certainty, simplicity and administrability; secondly, that the regulatory structure should embody local legal traditions and should be open to international models, thirdly, that nonprofit organisations and their regulatory structures should be subject to transparency and accountability; and that tax benefits should distinguish between public benefit and mutual benefit organisations.¹³⁰

The framework legislation model seems appropriate for countries where the concept of the 'nonprofit sector', by whatever name called, is at an emerging stage. This position is implicitly supported by the observation, made in respect

¹²⁸ Ferraro, *op. cit.* at 28.

¹²⁹ J.L. Fleishman, 'Public Trust in Not-for-Profit Organisations and the Need for Regulatory Reform' in C. Clotfelter and T. Ehrlich (Eds.) *Philanthropy and the Nonprofit Sector in a Changing America* (Bloomington: Indiana University Press, 1999) p.189.

¹³⁰ Ferraro, *op. cit.* at 31. See distinction between public benefit organisation and mutual benefit organisation in the definition of the former in 1.5 *supra*.

of the United States nonprofit sector that '[i]f we were starting from scratch, I would favor the creation of an independent agency [empowered] with all aspects of the regulation of not-for-profit organisations, including the granting of tax exemption in the first place..... We are not, alas, starting from scratch.'¹³¹

Finally, on the framework legislation model, the existence of a legal framework for nonprofit organisations is perceived as an indicator of the strength of the sector in a particular country.

*'Where we do not find a strong NGO sector it is easy for the government to deal with the sector piece by piece and law by law, and while these laws may cover the individual issues adequately, in the end they become difficult to implement. When the sector is important enough and the laws are all grouped together into a framework legislation, we recognize a willingness and interest on the part of the leaders to confront the issue, the strength of the sector in the country and the presence of a good legal environment for NGOs. The sector is perceived as real, defined and part of the fabric of the country. When laws are scattered all over there is not likely to be a clear definition of the sector and consequently the atmosphere for NGOs is less hospitable than it could be.'*¹³²

Returning to the wider subject of the use of law within the development context, it needs to be acknowledged that a range of issues are intertwined in the operation of facilitating legal environment for the nonprofit sector in developing countries. In this respect, Paul and Dias play devil's advocate by pointing out how a desirable legal framework can be applied in a way that suppresses associational activity, as reproduced below. This they do to emphasise the ultimate importance of the involvement of the nonprofit constituency in the regulation of their own activities.¹³³ Thus, advocates and practitioners of law in development must keep in mind that:

'Laws which require registration and official approval of voluntary associations can be used to frustrate formation of "lawful groups".... Penal laws open-ended prohibitions against threats of disorder, often can be construed to legitimize suppression of group activities which cause no demonstrable harms – only the possibility in the minds of law enforcers. Similarly, licensing laws which regulate

¹³¹ Fleishman, op. cit. at 189.

¹³² Ferraro, op. cit. at 29.

¹³³ Paul and Dias (1992a), op. cit. at 296.

*group activities – such as holding meetings – can be used to frustrate organisational activities, particularly when the law enforcers are vested with lawless discretion ... and when people lack both tangible and intangible resources necessary to use courts as agencies to vindicate rights.'*¹³⁴

Thus a legal environment for the nonprofit sector within a developing society must possess not only the characteristic of clarity, but must be empowering and sustainable. Empowering in the sense that it is not unduly technical, but leaves room for innovation, and sustainable in the sense that future developments in the sector are anticipated and accommodated by reference to intersectoral consultation. In the field of development therefore, law operates as part of a multi-faceted process, which significantly works through nonprofit forms of association, rather than merely a normative system with its set of rules.¹³⁵

2.7 Conclusion

It is clear that the phenomenon of associational activity is acknowledged by scholars as the bedrock of democratic society, and is particularly useful in underdeveloped societies for giving expression to the needs and preferences of people. The academic focus on these processes is therefore, no more transitional than is the need for the law of development. As Maurice Flory observes:

*'Would the international law of development be a transitional law? Such an evolution would only be possible if underdevelopment had disappeared. But it is a fact that underdevelopment still exists and that after its third decade, many other decades might well follow. The international law of development is therefore settled for some time.'*¹³⁶

Anheier's studies, focused on the trends in developmental policies in African countries with a view to highlighting and explaining the increased focus, in the 1980s, on private voluntary organisations offers significant scholarship on the nonprofit sector in African countries which brings Africa into the international

¹³⁴ Paul and Dias (1992b), op. cit. at 307.

¹³⁵ Slinn, op. cit. at 28.

¹³⁶ Flory, op. cit. at 23.

study forum of the nonprofit sector. Employing the term 'private voluntary organisation' (PVO) to describe the nonprofit entity, he maintains that his study 'has demonstrated the weak link between the work on PVOs in Africa as represented in the development literature, and the body of theories and approaches which help explain the role of PVOs in Western countries.'

*'Our understanding of PVOs in Africa can benefit from comparative analysis by incorporating knowledge of the historical and present role of PVOs in other countries and parts of the world. In the African case, the economic and political rationales for PVOs need further clarification, as do their comparative advantages when compared to the state agency or the for-profit enterprise: the role of PVOs in political mobilization, social movements, and policy formulation; and their economic importance in terms of resource mobilization, "gap-filling" activities, and the provision of public and semi-public goods.'*¹³⁷

The alternative law of development, as earlier discussed, reflects the view of some legal scholars on how the law of development at the international level is to be reconceptualised to avoid the unfavourable effects of past legal orders, which gave primacy to the economic order as the chief indicator of development.¹³⁸

The weight of scholarly findings show that nonprofit activity is essential to the health of a democracy, and indeed predates the state. The literature on Law in Development also shows that scholarly attention has been directed more at economic indices of development than at studying the work of nonprofit organisations, defining and improving the legal environment within which they have to work. The latter forms the subject matter of chapters three and four which focus on the nonprofit sector in Nigeria and South Africa respectively.

In terms of research approach, two main avenues for research into nonprofit organisations are suggested. One uses 'nonprofit' as a dependent variable by explaining its existence in organisational, sectoral and societal terms, while the second uses it as an independent variable, by focusing on showing the effect of

¹³⁷ Anheier, op. cit. at 374.

¹³⁸ See Flory, op. cit. for a detailed discussion of the 'third world view' of the international law of development.

nonprofit organisations on selected variables.¹³⁹ This research fits into both approaches in the sense that it is an attempt to show how developmental needs have led to the growth of the nonprofit sector in the countries under study, and in turn, demonstrate how the peculiar characteristics of the nonprofit sector affect other organisational issues such as funding, administration and employment, as reflected in, or overlooked by the law.

¹³⁹ Seibel and Anheier, *op. cit.* at 14 and 15.

CHAPTER THREE

THE NONPROFIT SECTOR IN NIGERIA: GROWTH FACTORS AND LEGAL FRAMEWORK

3.1 Introduction

In chapter two, the theories on the factors responsible for the development of the nonprofit sector were discussed. The growth of this sector is attributed to a number of factors, including the inadequacies of government provision, the demands of heterogeneous populations, the responsive capacity of the nonprofit organisation to emerging needs and their orientation towards experimentation. Certain growth factors peculiar to the nonprofit sector in developing societies were also highlighted, expanding the theorisation on the subject. Theories of law in development were also discussed and applied to the phenomenon of the nonprofit sector, in a discourse that sought to establish the links between a favourable legal environment for nonprofit organisations and a thriving development 'industry'.

In this chapter, the process through which the contemporary nonprofit sector in Nigeria has metamorphosed will be discussed. In the wake of the human rights movement of the late 1980s and 1990s, the human rights-cum-civic-advocacy organisation emerged as a prominent type of the modern nonprofit organisation.¹ The chapter begins by recounting the convergence of factors responsible for this development. This is followed by an identification and examination of legal provisions directly relevant to the establishment and operation of nonprofit organisations in Nigeria. Finally, the compendium of laws relating to private sector employment is also described, with a view to determining the applicability of these laws to nonprofit sector employees from the scope of coverage.

¹ The terms 'nongovernmental organisation' (NGO) and 'civil society organisation' are the popular terms for describing the archetypal nonprofit organisation in Nigeria.

3.2 The Development of the Modern Nonprofit Organisation in Nigeria

A number of reasons have been advanced for the growth of the contemporary nonprofit sector in Nigeria. These growth factors will be described in this section, under four identified strains of thought, namely, government failure theory, alternative development theory, international relations theory and nationalist theory. It is important to mention at this point that in this work, the term 'nonprofit organisation' is used interchangeably with 'civil society organisation', 'nongovernmental organisation', 'civic-advocacy organisation', 'nonprofit agency' and other variants of these terms, depending on the context of the discussion. Similarly, the term 'nonprofit sector' is sometimes used interchangeably with the term 'third sector'. In particular, the terms 'nongovernmental organisation' (NGO) and 'civil society organisation' are the most commonly used in Nigerian literature and these feature significantly in this section of the work.²

3.2.1 Government Failure Theory

While it is understood that civil society predates the state, it is equally established that particular forms of civil society activity or certain agenda of associations of civil society are informed by the activity or inactivity of the state. In Nigeria, the increasingly overzealous activity of the post-independence military state in holding on to political and economic power resulted in the curtailing of individual liberties.³ This was further aggravated by state failure in providing and maintaining social service infrastructure.⁴ This was a direct result of the mismanagement of the nation's resources by successive governments, especially military juntas, worsened by a poorly

² See 1.5 supra for a definition of terminology.

³ See Y. Osinbajo, 'Human Rights, Economic Development, and the Corruption Factor' in P. Zeleza and P. McConaughay (Eds.), *Human Rights, The Rule of Law, and Development in Africa* (Philadelphia: University of Pennsylvania Press, 2004) pp. 120-1.

⁴ J. K. Fayemi, 'Entrenched Military Interests and the Future of Democracy in Nigeria' in A.T. Gana and S.G. Egwu (Eds.) *Federalism in Africa Vol. 2: The Imperative of Democratic Development* (Trenton: Africa World Press, 2003) pp.124-130; see also C.U. Nwankwo, M. Omopintemi (Ed.), *Nigeria Human Rights Report 2000* (Lagos: Constitutional Rights Project, 2001) pp. 1-2.

by the regime of structural adjustment programmes which deliberately sought to enforce market reforms and roll back the frontiers of the state.¹⁷

*'The economic and political dynamics associated with SAP led to the growing authoritarianism of the state and the shrinking of democratic possibilities.'*¹⁸

Welch concludes a succinct analysis of the period in Nigerian history with the observation that '[t]here is no question that the difficult human rights situation in Nigeria requires active indigenous monitoring groups, ready and able both to report the abuses they observed and to take corrective actions.'¹⁹ Following the return to civilian governance in 1999 and the successful transition in 2003 to a second term of civilian administration, a measure of political stability is now attributed to the Nigerian state, and perceptions of government failure are now directed particularly at socio-economic rights.²⁰

3.2.2 Alternative Development Theory

The government failure theory, over time, fused with the more generic perception of the evolution of nongovernmental organisations (NGOs) in developing countries as agents of positive intervention in development processes. In this regard, NGOs were seen as organisations that facilitate institutional capacity building within communities, thereby improving people's capacity to help themselves.²¹ As people responded to government neglect by forming self-help associations, so did international donors turn to nongovernmental organisations which offered 'alternative, less restrictive and effective structures for programme implementation.'²² This created an

¹⁷ A.T. Gana, 'Civil Society and the Consolidation of Democracy in Nigeria' in I.A. Ayua, D.A. Guobadia and A.O. Adekunle (Eds.), *Nigeria: Issues in the 1999 Constitution* (Nigerian Institute of Advanced Legal Studies, 2000) p.266.

¹⁸ Ibid. at 267. It seems that the government failure theory tends to manifest in different ways in developing and developed countries, and whereas it usually takes the form of breakdown of public services in the former, in the latter, it may simply be a lack of growth to meet increasing demand.

¹⁹ C. Welch, *Protecting Human Rights in Africa: Roles and Strategies of Non-Governmental Organizations* (Philadelphia: University of Pennsylvania Press, 1995) p.27.

²⁰ See Y. Akinseye-George 'Socio-Economic Rights and the Sustenance of Democracy in Nigeria' in Y. Akinseye-George and G. Gbadamosi (Ed.) *The Pursuit of Justice and Development: Essays in Honour of Hon. Justice M. Omotayo Onalaja* (Lagos: Diamond Publications Ltd., 2004) pp. 68-70.

²¹ D.J. Shehu, 'Non-Governmental Organisations and Development Process in Nigeria' in Y. Osinbajo et al (Eds.), *Human Rights, Democracy and Development in Nigeria* Vol. 1 (Lagos: Legal Research and Resource Development Centre, 1996) p.240.

²² Olumese, op. cit. at 155.

increased role for the nonprofit sector, especially for that section of it involved in the delivery of development projects. As Gana observes,

*'The significance of NGOs is measured by the influence they are believed to exert on the citizens of African countries through direct interventions in social and economic life.'*²³

Complementary to the service delivery and developmental roles of NGOs, is the continuing advocacy work of civil society organisations which draw the attention of government to the plight of the poor, thereby incorporating a 'people perspective' into the policy-making process at the national level.²⁴ At the international level, this developmental role is reinforced by international nongovernmental organisations which partner with African NGOs, and enhance their effectiveness in many ways.²⁵ Through such partnerships, international NGOs help bring everyday issues in development to the attention of the international community, and are instrumental in developing expertise and human potential for development processes.²⁶

In the case of Nigeria, this intervention occurred at the place of neglect and mismanagement by government, described by Gana as 'development vacuum'.²⁷ When government failed to respond to new approaches of participatory development, but remained attached to the paternalistic approach which provides services for people without involving them, nongovernmental organisations rose to fill this gap.²⁸ This theory celebrates the interventionist spirit of the nonprofit, nongovernmental organisation as one that works to 'develop human skills, generate enthusiasm, stay with a

²³ Gana, *op. cit.* at 265.

²⁴ Shehu, *op. cit.* at 240 and 243.

²⁵ See C.E. Welch, 'Human Rights and Development: NGOs' in Zeleza and McConaughay (Eds.), *op. cit.* at 204-5.

²⁶ Shehu, *op. cit.* at 240 and 242.

²⁷ Gana *op. cit.* at 266.

²⁸ B. Awe, 'Non-governmental Organisations and Development in Nigeria' in *Human Rights, Democracy and Development in Nigeria* Vol. 1 (Lagos: Legal Research and Resource Development Centre) p.260.

problem regardless of the odds, until it is solved.... bringing new thinking to old problems.'²⁹

This interventionist or alternative development theory seems to be anchored on the modern parameters for measuring development which have broadened beyond commercial and financial indices to include process indicators such as people's capacity to manage, induce and monitor positive change.³⁰ Education is central to this process as it develops people's ability to face the challenges of making choices while also increasing the choices available.³¹ Thus while the government failure theory views the nonprofit organisation phenomenon from the perspective of people's response to government neglect, the alternative development theory views it as an approach or method of development intervention.

3.2.3 International Relations Theory

Another theory points to the global north-south socio-economic divide as the origins of the nongovernmental organisation (NGO) phenomenon in the developing world generally. Thus historically, organisationally and financially, NGO activity is influenced by a combination of social, economic and political phenomena controlled by the north which have had the effect of increasing misery, unrest and insecurity among whole populations.³² The structural adjustment programme is an archetype of such northern-controlled phenomena that creates further developmental crises, which the north wades in to address using accumulated material surpluses from unequal, exploitative relations with underdeveloped and less developed countries. In this way, the northern agenda of maintaining the status quo to their advantage is achieved.³³

²⁹Shehu, op. cit. at 240.

³⁰ B. Yusuf, 'Non-governmental Organisations and Development in Nigeria' in *Human Rights, Democracy and Development in Nigeria* Vol. 1 (Lagos: Legal Research and Resource Development Centre, 1996) p.247.

³¹ Ibid.

³² Olorode, op. cit. at 3-7.

³³ Ibid. at 8.

This theory concludes that in Nigeria, the international catalyst for NGO growth was matched internally by the need for mass civic education to strengthen the popular base for the struggle to end military dictatorship. In this context therefore, NGO role transcends that of social engineering, and extends to social transformation. In other words, merely working to ameliorate or mitigate the effects of exploitation and abuse is not sufficient, and NGOs must engage with the goal of complete and radical transformation through the conscientisation of victims of abuse and exploitation in the direction of abolishing these evils.³⁴

Proponents of this theory argue that for popular empowerment to be achieved, an alternative development framework that would promote popular participation in the economic, social and political processes of the nation needs to be put in place and it is in this developmental space that NGO activity is located.³⁵ In this way, this theory is linked to the alternative development theory, earlier discussed.

It is considered relevant to observe that the setting up of the World Commission on the Social Dimension of Globalisation (the World Commission) by the International Labour Organisation in February 2002, seemed to be directed at addressing some of the issues raised by this school of thought.³⁶ The World Commission was established, among other things, to 'pinpoint ways of making globalisation more inclusive, so that the process can be viewed as fair to all, both within and among countries' Subsequently, United Nations General Assembly adopted by consensus, in December 2004, a resolution recognising the contribution of the Commission's Report to achieving a fully inclusive and equitable globalisation.³⁷ The mandate of the Commission 'to examine the process of globalization through the eyes of

³⁴ Ibid. Here, Olorode's theory further reflects the two-dimensional ethos for NGO activity found in the government failure theory in 3.2.1, namely the tyranny of the state and the neglect of the welfare of the governed.

³⁵ T. Babawale, 'Crisis, Adjustment and Popular Empowerment' in Olorode et al (Ed.), op. cit. at 17.

³⁶ See *The World Commission on the Social Dimension of Globalisation* brochure accessed at www.ilo.org/wcsdg accessed on 18/1/2006.

³⁷ See www.ilo.org/wcsdg The World Commission Report is entitled: *A Fair Globalization: Creating Opportunities For All*.

ordinary people' is sought to be placed on the agenda of member states of the United Nations and other UN bodies.³⁸

3.2.4 Nationalist and Political Theory

Another view attributes the late recognition by the United Nations (UN) of a right to democratic governance to the resistance to acknowledging overtly political rights. Among such rights were the right to self-determination, the illegality of racial discrimination and the legitimacy of liberation struggles in colonial territories.³⁹ Even the rights that were recognised by the Universal Declaration on Human Rights were not accompanied by any direct system for enforcement at the early stages. The latter gap was therefore filled in by international NGOs like Amnesty International and Human Rights Watch who conducted some monitoring activities in different countries.⁴⁰ This default in the UN enforcement mechanism served to develop an NGO agenda at the international level as well as a nationalist agenda at the internal level.

With regard to the last point, Nigerian nationalists of the early 20th Century were more concerned with certain forms of representative government and racial equality, and this they gradually secured through the 1922 and 1944 Constitutions.⁴¹ It was when the limited powers of the indigenous representatives became evident that democratic principles like self-determination, self-government and the extension of franchise beyond the educated elite became critical issues. These emerging issues were championed by a younger political elite, buoyed in their push for independence, by the international clamour for the rights of nations to self-determination.⁴²

³⁸ www.ilo.org/wcsdg accessed on 18/1/2006.

³⁹ I.E. Sagay, 'The Right to Democratic Rule as an International Human Right' in Olorode et al (Ed.), op. cit. at 24.

⁴⁰ Ibid.

⁴¹ A. Banwo, 'Democracy and Human Rights in Nigeria: An Overview' in Olorode et al (Ed.), op. cit. at 42.

⁴² Ibid.

Subsequently, a federal system of government was introduced by a new Constitution in 1954. Under the 1954 Constitution, each region had a measure of legislative autonomy. This development led to fears by minority ethnic groups that they would be dominated by regional governments controlled by majority ethnic groups.⁴³ The ensuing agitation led to the setting up of the Minorities Commission, otherwise known as Willink's Commission in 1957.⁴⁴ The recommendations of this Commission led to the inclusion of a bill of rights in the 1960 independence Constitution.⁴⁵ This, it was hoped, would guard against the erosion of individual rights by government.⁴⁶ At the continental level however, issues of nationalism and territorial sovereignty rather than specific human rights issues dominated the attention of newly independent African states and motivated OAU agenda at its inception in 1963.⁴⁷

Post-independence, from the military years (1966-1979) and into the second republic (1979 to 1983), rights issues were championed by student bodies and trade unions as the need arose.⁴⁸ The 'organisational ability, persuasive discipline and propaganda strength' of the trade unions, coupled with their traditional orientation to mass action is believed to have predisposed them to sustained democratic struggle, their degree of cohesion having been 'ranked only next to that of the military'.⁴⁹

In any event, the limitations of the sporadic or part-time approach to rights issues by these mainstream organisations soon became obvious. There was the realisation that the task needed greater commitment and consistency which could only be provided by professional workers in organisations with a

⁴³ Akande (1985), op. cit. at 5-6.

⁴⁴ Ibid. at 6. See also Welch (1995), op. cit. at 27.

⁴⁵ T.A. Aguda, 'Development in the Adjudicatory System' Chapter 2 of T.A. Aguda (Ed.), op. cit. at 34. See also, O. Gye-Wado, 'Fundamental Human Rights and Corresponding Civic Obligations under the 1999 Constitution' in Ayua et al (Eds.), op. cit. at 191.

⁴⁶ Welch (1995), op. cit. at 27. See also J. Akande, 'A Decade of Human Rights', Chapter 4 of Ajomo (Ed.), op. cit. at 103.

⁴⁷ See C. Heyns and F. Viljoen, 'The Regional Protection of Human Rights' in (P. Zeleza and P. McConaughay Eds.), *Human Rights, The Rule of Law, and Development in Africa* (Philadelphia: University of Pennsylvania Press, 2004) p.131, footnote 6, with endnote text on p.263.

⁴⁸ B. Ibhawoh, op. cit. at 17. See also P. Akinyanju, 'Trade Unions and Democratic Struggle' in Olorode et al (Eds.), op. cit. at 66.

⁴⁹ Akinyanju, Ibid. at 69.

focus on human rights and democracy.⁵⁰ This led to the formation of a broad-based coalition of students, academics, journalists, lawyers and activists known as Alliance for Democratic Rights in 1984, and in the late 1980s specialised human rights groups such as the Civil Liberties Organisation (CLO) which was established in 1987.⁵¹ These factors worked together to create a civil rights agenda for the activities of nongovernmental organisations in Nigeria in the 1980s.⁵² In other words, because of the multi-layered omnibus and diffuse character of organisations which pushed for rights, there was a limit to what they could do and eventually they gave way to single-focus organisations like the CLO.⁵³

Yet another school of thought suggests that the growth of human rights organisations in Nigeria in the late 1980s and early 1990s coincided with the indication of the military regime in 1987 that it would hand over power to a civilian government in 1990. The upsurge in human rights and pro-democracy NGOs was therefore thought to be a reflection of attempts by elites from a section of the country to position themselves to take hold of political power, with the aid of foreign funding, under the guise of human rights activism.⁵⁴ This view maintains that there was a derailing or degeneration of earlier human rights agenda into a subversion that sacrificed national unity on the altar of personal gain and power, sponsored from foreign sources.⁵⁵

A multiplicity of factors was no doubt responsible for the growth of civil society activity, but the outcome was the emergence of a mass of nonprofit organisations, a development that was reflected in other African countries during the same period. According to Welch, with the support of foreign donor sources, human rights non governmental organisations in Africa

⁵⁰ Ibid.

⁵¹ Banwo, op. cit. at 48.

⁵² Ibid.

⁵³ D. Olorunyomi, 'Effective Communication Strategies for NGOs' in Olorode et al (Eds.), op. cit. at 128-9.

⁵⁴ I. Gashash, 'Politics and Human Rights Organisations in Nigeria' in *Human Rights, Democracy and Development in Nigeria* Vol. 1 (Lagos: Legal Research and Resource Development Centre, 1996)

pp.266-7.

⁵⁵ Ibid.

'sprang up' in large numbers with the democratic openings of the early 1990s.⁵⁶ This was attributed to the 'crisis of epic proportions' confronting the post-colonial state in Africa since the early 1980s.⁵⁷ In the next section, the developments that followed the successful democracy campaign in the community of civil society organisations in Nigeria are highlighted.

3.3 Contemporary Developments in the Nonprofit Sector in Nigeria

The late 1990s brought political changes which saw the election of a civilian government in Nigeria in May 1999. This political change brought with it different perceptions about the continuing role of NGOs, particularly those centred on democracy and human rights. Gana describes state-NGO relations at this stage as capable of collaboration and co-operation, as much as confrontation, which had characterised the military era.⁵⁸ A study on this subject in relation to human rights organisations specifically, found that they had adjusted well to the challenges of human rights work in the new democratic dispensation.⁵⁹ This they did, mostly by incorporating programmes geared towards developing their institutional capacity for other processes, mainly that of legislative advocacy.⁶⁰

The report also found that several NGO networks were formed and that human rights NGOs had begun to collaborate with state institutions. In April 2001 for instance, the Constitutional Rights Project, a human rights NGO, in collaboration with the Senate Committee on Human Rights organised a two-day workshop in Abuja on 'Legislative Agenda for Legal Reforms and Human Rights', funded by the Royal Norwegian Embassy.⁶¹ The workshop was aimed at initiating a process of legislative review of military decrees

⁵⁶ Welch (2004), op. cit. at 202.

⁵⁷ Gana, op. cit. at 265-6.

⁵⁸ Ibid. at 266.

⁵⁹ Ibhawoh, op. cit. at 17.

⁶⁰ Ibid.

⁶¹ See C. Nwankwo and O. Lawal (Eds.) *Legislative Agenda for Legal Reforms and Human Rights* (Constitutional Rights Project, 2002) p. 5.

found to contain unconstitutional provisions or provisions that were in violation of human rights.⁶²

Some other coalitions of NGOs emerged with the aim of facilitating a participatory approach to the review of the 1999 Constitution to make it a more credible and reliable legal instrument for good governance and human rights observance. One such coalition was the Citizens' Forum for Constitutional Reform (CFCR), which rapidly recorded a membership of about ninety NGOs spread across the country, with a state co-ordinator in each of the thirty-six states of Nigeria.⁶³

Yet other collaborative initiatives were taken by international institutions working to strengthen new democracies. For instance, the Swedish-based International Institute for Democracy and Electoral Assistance (IDEA) collaborated with a number of NGOs to organise a multi-level project aimed at establishing a representative platform and process. Under the project, visits were made to executive, traditional and religious leaders while other stakeholders such as civil society activists, academics and politicians, among others, were brought together in workshops to discuss issues fundamental to the strengthening of democracy in Nigeria.⁶⁴

Another effort was initiated by the Transition Monitoring Group (TMG), a coalition of over sixty NGOs established in August 1998, in the wake of the transition programme announced by the then new military head of state, General Abdulsalami Abubakar.⁶⁵ The TMG emerged with a three-fold mission of observing elections, fostering civic education and promoting democratic norms. It significantly discharged this mandate by carrying out an intensive exercise of training and deploying over ten thousand election

⁶² Ibid.

⁶³ See Citizens' Forum for Constitutional Reform (CFCR): *Memoranda submitted to the Presidential Committee on Provisions for and Practice of Citizenship and Rights in Nigeria and the Presidential Committee on National Security in Nigeria* (Lagos: Citizens Forum for Constitutional Reform, 2002); see also O. Igbuzor, *A Critique of the 1999 Constitution Making and Review Process in Nigeria* (Lagos: Citizens Forum for Constitutional Reform, 2002) pp.36-41.

⁶⁴ A. Agbaje, N. Gasa and O. Bamidele (Eds.) *Democracy in Nigeria: Continuing the Dialogues: Report of the Zonal Workshops, Nigeria, June – August 2001* (Lagos: International Institute for Democracy and Electoral Assistance).

⁶⁵ General Abubakar succeeded General Abacha following the unexpected death of the latter in June 1998.

observers to all thirty six states of the country and Abuja in the 1998-99 general elections in Nigeria. This collaborative exercise between geographically and thematically diverse NGOs 'exposed the fact that these organisations [were] very much unequal in terms of capacity'.⁶⁶ After the formal transition process, therefore, the TMG embarked on other activities, principally in the area of developing strategies for monitoring elected representatives. Management workshops were also organised to enhance the capacity and effectiveness of member organisations of the TMG, as well as other NGOs, in their distinct organisational agenda and in the work of the TMG coalition.⁶⁷

In 2003, the Freedom of Information Coalition emerged as an online community of civil society groups campaigning for the enactment of a Freedom of Information Act in Nigeria. The Freedom of Information Bill was placed before the National Assembly in 1999, following swiftly on the heels of the inauguration of the new civilian government. In August 2004, the bill was passed by the House of Representatives, but it is yet to be passed by the Senate.⁶⁸

In all, the nonprofit sector in Nigeria, typified by human rights and civic-advocacy NGOs has grown dramatically since the return to civilian rule, giving credence to the observation that 'the density of human rights NGOs tracks closely with the relative openness of the political system.'⁶⁹ A national study carried out by the Centre for Democracy and Development, a nonprofit civic-advocacy organisation in Lagos, indicates that from a handful in the late

⁶⁶ E. Iheme (Ed.), *Fundamentals of NGO Project Management* (Lagos: Transition Monitoring Group, 2000) p. vii.

⁶⁷ See *Manual of Town Hall Meetings in Local Government Wards* (Lagos: Transition Monitoring Group, 2000). See also Iheme, op. cit.

⁶⁸ See <http://mediarightsagenda.org/foi.html> accessed on 27/1/2006, for updates on the progress of the Freedom of Information Coalition and the text of the Freedom of Information Bill, hosted by the Media Rights Agenda, a Lagos-based human rights organisation.

⁶⁹ Welch (2004), op. cit. at 203.

1980s, organisations with a human rights thrust, or at least a civic-advocacy component, has grown to well over three hundred.⁷⁰

Having earlier established the pervading effect of law on the work of the nonprofit sector, in active and passive ways in chapter two, the next section will be devoted to examining the state of legal research in the sector in Nigeria.

3.4 Legal Environment for the Nonprofit Sector in Nigeria

Not many authors have given attention to studying the composite legal environment for establishing and operating nonprofit organisations in Nigeria, perhaps due to a longstanding 'private practice oriented approach' in the teaching and study of law.⁷¹ The curriculum of the Nigerian Law School demonstrates this focus.⁷² Legal scholarship in this area has been so limited that research has had to be commissioned on the subject by the United Kingdom Department for International Development (DFID) in Nigeria, resulting in twin publications on the subject.⁷³

Through a review of primary legal sources that provide for the registration of nonprofit organisations, the first part of the DFID research set out the process for setting up a nongovernmental organisation (NGO), a community based organisation (CBO), a co-operative or the local office of an international non-governmental organisation (INGO). Secondly, the research offered a working definition of nongovernmental organisations, a term which was not provided in any of the statutes reviewed.⁷⁴ Thirdly, it brought some useful information to light for nonprofit sector practitioners and funders on

⁷⁰ Generic Study on Nigerian NGOs commissioned by the Ford Foundation and carried out by the Centre for Democracy and Development (CDD), Lagos (unpublished study obtained in April 2003 from CDD).

⁷¹ A. O. Chukwurah, 'A Critique of the Content and Scope of Undergraduate Legal Education: The Need for Curriculum Reform' in I.A. Ayua and D.A. Guobadia (Eds.), *Legal Education for Twenty-First Century Nigeria* (Lagos: Nigerian Institute of Advanced Legal Studies, 2000) pp.55-6.

⁷² The curriculum for the legal practice course that leads to admission to the Bar is set out in P.C. Anaekwe, 'Vocational Aspects of Legal Training: A Critique of the Content and Scope of the Law School Curriculum' in Ayua and Guobadia (Eds.), op. cit. at 97-8 and 104-5.

⁷³ See M. Olowokure, *The Legal Aspects of Establishing a Non-Governmental Organisation in Nigeria* (Kaduna: Department for International Development, 1999). See also M.Olowokure, *A Review of the Legal Environment of NGOs in Nigeria* (Kaduna: Department for International Development, 2000).

⁷⁴ Olowokure (1999), op. cit. at 2.

the processes for registering a nonprofit organisation at the national, state and local government levels. The term 'nongovernmental organisation' was used for purposes of the DFID research, and was defined as:

*'... organisations which are voluntary, independent, not-for-profit and aim to improve the circumstances of disadvantaged people, regardless of whether they have been registered by Federal, State or Local Governments. Such organisations include well-organised and registered groups, Community Development Associations, religious organisations, and traditional structures. Other intermediary organisations include public and private sector service providers.'*⁷⁵

The follow-up research examined statutory provisions that apply to the operation of NGOs, CBOs, Co-operatives and INGOs.⁷⁶ The status of the study as a commissioned project was both a facilitating and a limiting factor. It was facilitating in the sense that such a study might not have been carried out at all if it was not part of a broader programme of development assistance provided by the DFID.⁷⁷ On the other hand, the terms of reference limited the researchers to the legal and administrative processes for registering an NGO or INGO in Nigeria, and other incidental provisions relating to its operations.⁷⁸ Other relevant issues such as legal provisions on associational rights and nonprofit sector employment were not dealt with, except for the provisions of the Nigeria Social Insurance Trust Fund Decree 1993 relating to the liability of certain employers to register employees with the Fund.

Legal research into the nonprofit sector has encountered the problem of nomenclature arising mainly from the fact that 'the few Nigerian statutes relating to NGOs do not define the term NGO, even where the term is specifically mentioned in the body of the statute.'⁷⁹ In some cases, this circumscribes the application of the statutes. For instance the Companies and Allied Matters Act 1990 (CAMA) which is the principal statute governing the registration of not for profit organisations in Nigeria does not define the term

⁷⁵ Ibid. at 5.

⁷⁶ Olowokure (2000), op. cit.

⁷⁷ The study was commissioned by the U.K. Department for International Development (DFID) through its Capacity Building for Decentralised Development (CBDD) programme. See Olowokure, (1999), op. cit at 39 and 41.

⁷⁸ See the legal consultant's terms of reference in Olowokure (1999), op. cit. at 42.

⁷⁹ Ibid. at 1.

'nonprofit', even though it makes extensive provisions for the registration of associations set up for nonprofit purposes.⁸⁰

Having described the limited nature of research in this area of the law, the rest of this chapter will be dedicated to examining some points of intersection between the law and the nonprofit sector. The aim is to identify the laws which jointly create the basic legal framework for the establishment of nonprofit organisations and for the work of the nonprofit sector in Nigeria. Selected legal provisions will be discussed by reference to three broad issues, namely, associational activity, registration and tax status, and employment.

3.5 Legal Provisions for Associational Activity in Nigeria

Generally speaking, the bill of rights enshrined in the 1999 Constitution along with the directive principles of state policy offer a constitutional basis for most of the activities carried out by nonprofit organisations.⁸¹ Some of the provisions supply the specific mission of certain organisations, while other provisions of the bill of rights apply in a more generic way. In particular, the provision on freedom of peaceful assembly and association creates a conducive space for associations of civil society to take root. As Akande observes, 'It is beyond debate that freedom to engage in association for the advancement or protection of interests is an inseparable aspect of liberty.'⁸²

In this regard, the Constitution of the Federal Republic of Nigeria 1999 (CFRN 1999) provides in section 40 as follows:

'Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests:

*Provided that the provisions of this section shall not derogate from the powers conferred by this Constitution on the Independent National Electoral Commission with respect to political parties to which that Commission does not accord recognition.'*⁸³

⁸⁰ CAMA 1990 Part C.

⁸¹ See Constitution of the Federal Republic of Nigeria 1999 (CFRN), Chapter IV, see also ss.13-24 CFRN on the directive principles of state policy.

⁸² J. O. Akande, *Introduction to the Constitution of the Federal Republic of Nigeria 1999* (Lagos:MIJ Professional Publishers, 2000) p.98.

⁸³ CFRN 1999, s. 40.

Further, 'association' is defined as 'any body of persons corporate or unincorporated who agree to act together for any common purpose, and includes an association formed for any ethnic, social, cultural, occupational or religious purpose.'⁸⁴ Political party is distinguished by its definition as 'any association whose activities include canvassing for votes in support of a candidate for election to the office of President, Vice-President, Governor, Deputy Governor or membership of a legislative house or of a local government council.'⁸⁵

The effect of section 40 is that nobody can be compelled to associate with other persons against their will. Although the case law on the provisions of the 1999 Constitution is still in the process of development, the provision on freedom of association has been upheld through previous Nigerian Constitutions. Consequently, a custom purporting to draft a person into an association against their will was held to be unenforceable in a case, the facts of which occurred during the pendency of the 1963 Constitution.⁸⁶ Similarly, in *Anigboro v Sea Trucks (Nig.) Ltd.*⁸⁷ the act of the respondent in dismissing the appellant and his co-workers for joining one trade union instead of another was held to be a breach of section 37 of the 1979 Constitution which provided for freedom of association.

Related to the freedom of association is the right to freedom of expression and the press. These rights make up the category of rights described as political and moral rights.⁸⁸ In this regard, the 1999 Nigerian Constitution provides that 'Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.'⁸⁹ This constitutional guarantee

⁸⁴ S. 229.

⁸⁵ Ibid.

⁸⁶ See *Agbai v. Okogbue* (1991) 7 NWLR (Pt.204) p.391, where s.26 of the 1963 Constitution, which was the corresponding to s.40 of the 1999 Constitution, was invoked to hold that a person could not be forced to be part of a local age grade association .

⁸⁷ (1998) 1 HRLRA 291.

⁸⁸ Akande (1989), op. cit. at 105.

⁸⁹ CFRN 1999 s.39(1).

also encompasses an entitlement to own, establish and operate any medium for the dissemination of information, ideas and opinions.⁹⁰ Smith submits that 'medium for dissemination of information, ideas and opinion' in section 39(2) must be given a broad interpretation.⁹¹ This was the case in *Ukaegbu v Attorney-General Imo State*⁹² where a school was held to be covered by that provision.

Even in the midst of strong military oppression, the courts have demonstrated a commitment to upholding the right to freedom of expression. In *Tell Communications Ltd. & Ors. v State Security Service & Anor.*,⁹³ the conditions for exercising the power conferred by a military decree on a Head of State to proscribe offensive publications were interpreted strictly, and held not to have been fulfilled and the proscription order made against the plaintiff, a publishing house, under that decree was held to constitute a violation of the right to freedom of expression and press freedom. A similar position was taken by the Federal High Court in *Punch Nig Ltd v Attorney-General of the Federation*.⁹⁴

However, these rights are not unqualified. The right to freedom of expression and the press, for instance, is primarily freedom from previous restraint and not immunity from ordinary laws of the land subsequent to publication.⁹⁵ It does not protect the publication of false information.⁹⁶ Having examined the constitutional provisions on the freedom of association, the next section of the work assembles the provisions applicable to the creation of a nonprofit organisation as a legal entity.

⁹⁰ S. 39(2).

⁹¹ I. O. Smith, *The Constitution of the Federal Republic of Nigeria, Annotated* (Lagos: Ecowatch Publications, 1999) p.66.

⁹² (1983) ANLR

⁹³ (2000) 2 HRLRA 104. See also *Punch Nig Ltd v Attorney-General of the Federation* (1998) 1 HRLRA 488.

⁹⁴ (1998) 1 HRLRA 488. In *Oyegbemi & ors. v. Attorney-General of the Federation and ors.* (1982) 3 NCLR 895, it was held, under a corresponding provision in the 1979 Nigerian Constitution, that non disclosure of the source of a published information by an editor did not amount to contempt of court.

⁹⁵ Akande (2000), op. cit. at 95.

⁹⁶ *Adikwu & Ors v. Federal House of Representatives & ors.* (1982) 3 NCLR 394.

3.6 Registration and Tax Provisions

In this section of the work, the legal provisions that govern the establishment and operation of a nonprofit are identified. First, the provisions defining the corporate status of a nonprofit organisation are discussed, after which the tax law provisions are examined. There are two ways of registering a nonprofit organisation in Nigeria. One way is to register the organisation as a company limited by guarantee. Another way is to register the organisation as an unincorporated trustee.

3.6.1 Registration as a Company Limited by Guarantee

In respect of registration as a company limited by guarantee, section 26(1) of the Companies and Allied Matters Act 1990 (CAMA) provides that:

'where a company is to be formed for promoting commerce, art, science, religion, sports, culture education, research, charity or other similar objects, and the income and property of the company are to be applied solely towards the promotion of its objects and no portion thereof is to be paid or transferred directly or indirectly to the members of the company The company shall not be registered as a company limited by shares but may be registered as a company limited by guarantee.'

A number of strict regulatory requirements apply to companies registered under CAMA, including companies limited by guarantee. Firstly, the accounting records of such a company should be kept updated daily, such that the financial position of the company at any time, will be evident.⁹⁷ Specifically, there must be 'entries from day to day of all sums of money received and expended by the company, and the matters in respect of which the receipt and expenditure take place; and a record of the assets and liabilities of the company.'⁹⁸

Further, the directors of a company, including companies limited by guarantee are required to prepare yearly financial statements, comprising ten different documents. These include statement of the accounting policies; the balance sheet as at the last day of the year, notes on the accounts, auditor's

⁹⁷ S.331(2)(a).

⁹⁸ S.331(3).

reports, directors' report, statement of the source and application of funds, a five-year financial summary, and an income and expenditure account for the year.⁹⁹

A form is provided for the annual returns to be made by a company limited by guarantee.¹⁰⁰ The annual return should be accompanied by a statement containing particulars of the total amount of indebtedness of the company in respect of all mortgages and charges which are required to be registered with the Commission, and should be completed within forty two days of the annual general meeting for the year.¹⁰¹

3.6.2 Registration as an Incorporated Trustee

With regard to registration as an unincorporated trustee, CAMA provides that:

*'Where one or more trustees are appointed by any community of persons bound together by custom, religion, kinship or nationality or by any body or association of persons established for any religious, educational, literary, scientific, social, development, cultural, sporting or charitable purpose he or they may if so authorised by the community, body or association apply to the Commissionfor registration as a corporate body.'*¹⁰²

An application for registration as an incorporated trustee is required to state the name of the association, its aims and objectives and the particulars of the secretary of the association, if any. The application should be accompanied by two printed copies of the constitution, signed copies of the minutes of the meeting appointing the trustees and authorising the application, and the impression or drawing of the proposed common seal.¹⁰³ Thereafter, the application is published in two daily newspapers, one of which must have a national circulation, inviting objections, if any, to the registration of the body.¹⁰⁴ Subsequently, any change to the name, objects and trustees of the

⁹⁹ S. 334(1) and (2).

¹⁰⁰ CAMA, Schedule 10.

¹⁰¹ CAMA, ss. 373 and 374.

¹⁰² S. 673 (1).

¹⁰³ S. 674(1) and (2).

¹⁰⁴ S. 677(1) and (2).

organisation must be approved by the Corporate Affairs Commission (CAC), and advertised in two daily newspapers.¹⁰⁵

The nonprofit clause is found in section 686(1) of CAMA, which provides that:

'The income and property of a body or association whose trustee or trustees are incorporated under this PART of this Act shall be applied solely towards the promotion of the objects of the body as set forth in its constitution and no portion thereof shall be paid or transferred directly or indirectly, by way of dividend, bonus, or otherwise by way of profit to any of the members of the association.'

Further, with the exception of ex-officio members of the governing council, the Act prohibits the payment of salary or other remuneration to members of the governing council of the organisation, except for the reimbursement of out-of-pocket expenses. What is provided for is the payment of a 'reasonable and proper remuneration to an officer or servant of the body in return for any service actually rendered to the body or association.'¹⁰⁶

3.6.3 Registration and Non-registration of Associations

From the foregoing, it can be seen that a company limited by guarantee is a company registered for purposes other than for profit, in respect of which the members undertake liability for any indebtedness upon winding up, up to a certain limited sum. An incorporated trustee, on the other hand, is an organisation which is represented by persons designated as trustees, for the purpose of registering the organisation to perform its objects, which are usually for the benefit of society at large, or a section of it.

It is not clear whether any advantage lies in one mode of registration over the other, but it has been reported that nonprofit organisations seeking registration find it easier to register as incorporated trustees, as the Corporate Affairs Commission (CAC) often demonstrates a reluctance to register

¹⁰⁵ S. 680(1) and (2).

¹⁰⁶ S.686(2).

nonprofits as companies limited by guarantee.¹⁰⁷ This, it seems, is linked to the concern by CAC that the 'limited-by-guarantee' status might be abused by unscrupulous business interests simply seeking to avoid paying tax.¹⁰⁸

It must be observed that non registration of an association of persons for nonprofit purposes does not make the association illegal, as the freedom of association is guaranteed under the Constitution, as earlier discussed, but in the final analysis, what makes an association illegal is the nature of its activity.¹⁰⁹ Non registration may however limit the capacity of such an association of persons to carry out documentary transactions, access donor funds or earn legitimacy, and also make members of an unincorporated association personally liable in legal proceedings in respect of the activities of the association.¹¹⁰ Mustapha cites the cases of *Onaga & others v. Micho & Company*¹¹¹ and *Ogbodo v Ishokare*¹¹² in support of the point that associations of persons with no separate existence from their members are not legal persons and cannot sue or be sued in the association's name.

In *Onaga & others v. Micho & Company*, the plaintiff-respondent, a building company entered into a contract with a communal association. The contract was signed on behalf of the association, by the defendant, an officer of the union. A breach of contract occurred and the plaintiff sued the defendant-appellant for damages. The defendant contended that the action should have been instituted against the association, but the Supreme Court, discountenanced this argument and held that since the communal association was an unincorporated body, the defendant-appellant was the proper person to sue since he had signed the contract. A similar position was held in *Ogbodo v Ishokare*, where the court held that the inclusion of a nonjuristic association

¹⁰⁷ Olowokure (2000), op. cit. at 45.

¹⁰⁸ Ibid.

¹⁰⁹ Olowokure (1999), op. cit. at 36.

¹¹⁰ A.D. Mustapha, *Registration Law and Practice of Incorporated Trustees* (Abuja: Corporate Law Publications, 1999) p.5.

¹¹¹ (1961) All NLR 324.

¹¹² (1967) NMLR 234.

as a plaintiff was acceptable as long as the natural persons who are agents of the association are joined as co-plaintiffs.¹¹³

The registration of an association as an incorporated trustee confers juristic personality on that association, and typically, lawsuits involving associations registered as incorporated trustees are conducted in the name of the registered trustees of the association.¹¹⁴ Further a juristic person can sue or be sued only where its juristic or corporate personality is subsisting.¹¹⁵

Having examined the fragmented legal provisions for registering nonprofit organisations in Nigeria, it is very persuasive to come to the same conclusion as Olowokure, as follows:

*'The Companies and Allied Matters Act (CAMA) is either not drafted with NGOs in mind or has deliberately attempted to create a relatively free environment for NGO operations. Whatever the case, the Corporate Affairs Commission (CAC) appears to have its hands full regulating the affairs of companies run for profit.'*¹¹⁶

It is submitted that the former is more likely the case, that is, that the provisions of CAMA were not made with the nonprofit sector in mind, as the perception of nonprofit organisations as a sector is only an emerging thing in Nigeria.

3.6.4 Tax Status

Tax exemption is provided by the Companies Income Tax Act 1979 in respect of profits made by specified nonprofit bodies, with the proviso that such profits must not be derived from trade or business carried on by such company. The bodies so exempted are registered friendly societies, co-operative societies, registered trade unions and 'any company engaged in

¹¹³ See Mustapha, op. cit. at 5-7. An interesting distinction between juristic and juridical entities was made in the case of *Fawehinmi v Nigerian Bar Association* (No. 2) (1989) 2 NWLR Pt 5 p.577, the juridical entity, having power to sue and be sued, while not a corporate entity.

¹¹⁴ See for instance the case of *Registered Trustees of the Apostolic Church v Olowoloni* (1990) 10 NILR 5, accessed at <http://www.nigeria-law.org/LawReporting.htm> on 11/1/2006.

¹¹⁵ Mustapha, op. cit. at 4. See also *Nigerian Nurses Association & others v. Attorney-General of the Federation & others* (1981) 11-12 SC 1.

¹¹⁶ Olowokure (2000), op. cit. at 47.

ecclesiastical, charitable or educational activities of a public character'.¹¹⁷ The term 'profits' as distinct from 'income' is specifically used, and the word 'company', not 'organisation' is used.

Donor deductible status is conferred in respect of donations to a limited scope of nonprofit associations. These are ecclesiastical, charitable, benevolent, educational and scientific institutions specifically listed in the statutory provision.¹¹⁸

Further, by section 27(1) of the Capital Gains Tax Act¹¹⁹, certain categories of nonprofit organisations are exempt from paying capital gains tax, in so far as the gain accruing from the disposal of the organisation's assets are applied solely towards the achievement of the purpose for which the institution or society was established.¹²⁰

It needs to be mentioned that apart from public companies quoted on the Nigerian Stock Exchange, the mechanism for the collection of tax in the Nigerian private sector is weak, and case law is rarely generated in this area of the law. Moreover, nonprofit organisations generally prefer to assume that they are tax exempt and do not need to do anything further to activate this entitlement. This may be as a result of the bureaucratic challenges associated with attempting to secure a tax exemption certificate.¹²¹

With regard to funding, Oroh maintained that it is important to prepare an annual budget even if funding is uncertain, so that whatever funding does come in will be optimally utilised.¹²² Secondly, clear accounting procedures prescribed by funders must be followed in respect of each project grant. This point takes on greater importance when it is considered that about the only consistent form of control exercised over NGO management

¹¹⁷ Companies Income Tax Act 1979 (CITA) Cap. C21 Laws of the Federation of Nigeria 2004, s.19(1).

¹¹⁸ CITA, s.25(4).

¹¹⁹ Cap 42 Laws of the Federation of Nigeria 1990.

¹²⁰ See also Mustapha, *op. cit.* at 52-3.

¹²¹ See Appendix C, item (xi).

¹²² A. Oroh, 'Managing NGO Finances and their Effective Administration' in Olorode et al (Eds.), *op. cit.* at 138.

and administration comes indirectly from funders' requirements.¹²³ Thirdly, for long-term sustainability, it is imperative that NGOs in Nigeria develop alternative sources of funding, perhaps through a separate corporate entity registered for the purpose of making investments in stock and real property.¹²⁴

Having seen the basic legal environment for establishing a nonprofit organisation in Nigeria, the next section will be devoted to the third point of legal intersection identified for the study, namely the subject of human resources, employment relations and law in the nonprofit sector. Ultimately, the task in this section is to identify and piece together the body of employment law applicable to staff of nonprofit organisations.

3.7 Human Resources in the Nonprofit Sector in Nigeria

In this section, the subject of employment relations in the nonprofit sector, which has received marginal attention in the literature on Nigerian civil society organisations is discussed. To place the discussion in context, the history of modern employment relations in Nigeria is traced, while key employment statutes are examined to determine their applicability to the nonprofit sector as an emerging employer. In this section, 'employment law' is used interchangeably with the term 'labour law', while 'employment relations' is used interchangeably with 'labour relations'.

3.7.1 Employment Relations in the Nonprofit Sector in Nigeria

A distinct view on employment in the nonprofit sector is that '... relative to their own societies, employees of African human rights NGOs belong to a relatively privileged, small sector of educated urbanized middle-class professionals in societies where the strong majority are likely to be semi-literate, rural, and relatively impoverished.'¹²⁵ On the other hand, the

¹²³ Ibid. at 132.

¹²⁴ Ibid. at 139.

¹²⁵ See Welch (2004), op. cit. at 204.

obscured position of employees in the nonprofit sector is captured, if not problematised, by the following statement:

*NGOs are accountable certainly to their contributors, and also to any donor agencies which provide them with funds, but also to some extent to public officials, and of course to their employees (although this is not often stated explicitly).*¹²⁶ -- emphasis added

Very few authors or commentators on the NGO sector have addressed employment issues in nonprofit organisations in Nigeria. Where it has been mentioned at all, references to the staff or employees of an NGO have been marginal. Conferences on NGO matters have been largely limited to the thematic focus of each organisation, usually on such topical issues as civic empowerment, human rights, gender and development, HIV/AIDS, environmental issues and resource control. Since most NGO publications in Nigeria emerge from conferences and workshops, it follows that not much is published on the subject. A researcher in this area will have to glean from what is available to create a human resource profile of NGOs in Nigeria.

The subject of employment relations is brought squarely into the NGO discourse with the observation by the Executive Director of the oldest surviving human rights NGO in Nigeria that "in most NGOs, there are no specific career paths for the members of staff."¹²⁷ This statement is located in a broader treatment of NGO administration and finance with a thrust on sustainability. The thesis of the paper is that the survival and continued relevance of an NGO will depend on its ability to successfully combine its financial, physical and human resources in the delivery of projects in a way that is satisfactory to its funders and motivating to its staff.

With regard to its human resources, the hierarchy of authority should be clearly defined as this facilitates the effective running of the NGO. Staff recruitment procedures as well as career advancement paths should be set out, with staff appraisal mechanisms to monitor performance. Also, there should be a comprehensive written conditions of service 'based on a

¹²⁶ Uphoff, *op. cit.* at 24.

¹²⁷ Oroh, *op. cit.* at 142.

negotiation between the staff and management', which should, among other things, define the relationship between the organisation and members of staff, and set out the terms and conditions of employment including advancement routes and disciplinary procedures.¹²⁸

While Oroh's submissions described above, stop short of exploring the legal provisions applicable to employment in an NGO, they do set out indicators for conducting an employment relations audit of the non-governmental organisation, and by so doing, chart new research paths on the subject of employment issues in NGO institutionalisation.

In comparison to Oroh, some other contributors have merely brushed on human resource issues in the nonprofit sector while commenting on other aspects of NGO activity. In some quarters, commentators have advocated the setting up of a supervisory body to regulate the activities of NGOs in Nigeria, citing the National Association of NGOs (NANGO) in Zimbabwe as a precedent in the right direction.¹²⁹ Others have commented on the need for organisations and professionals dedicated to the protection of the fundamental rights of individuals, but have not followed up on the dynamics of establishing this much desired professionalism.¹³⁰

Yet others have recounted the background to the history of the human rights and women's rights movements, but have not studied the organisational character of the movement, and especially not the employment relations within these organisations.¹³¹ Where poor staffing has been identified as a constraint facing NGOs, the dynamics responsible for this have not been researched into and the ways of addressing this constraint have not been explored significantly.¹³²

In a work that focuses on the growth of the nonprofit sector, Awe identified the existence of paid staff and appropriate management structures as some of the features that distinguish, in working terms, an NGO from a

¹²⁸ Ibid. at 142-3.

¹²⁹ Olorode, op. cit. at 8.

¹³⁰ Banwo, op. cit. at 48.

¹³¹ Yusuf, op. cit. at 249-50.

¹³² Ibhawoh, op. cit. at 30-31.

community based organisation (CBO), but does not explore how these two features engage with one another, in other words, how these employees relate with management and vice versa¹³³ Olorunyomi examined communication strategies for NGOs, demonstrating the link between effective communication and institutional development of an NGO. He however does not explore the various dimensions and levels of communication within NGOs, such as that between staff and management.¹³⁴

Ibhawoh advances the frontiers of the subject of study, albeit indirectly when he identifies professional positions in human rights NGOs to include programme staff, staff attorneys, researchers, social workers, medical professionals, forensic experts and economists.¹³⁵

It seems, on the whole, that employment is considered only incidental in dominant treatments of nonprofit organisations, and not essential to the raging sustainability debate in the sector. It is however submitted that whatever the limitations of these fleeting brushes with the subject of employment relations in the nonprofit sector, they do indicate that the trend in the sector is institutionalisation, a process which would certainly require the development of all the components of the nonprofit organisation. One critical dimension of this development is the building of a professional staff base, and this brings into the spotlight the human resources, or more appropriately the 'missionaries' of the third sector. This subject is better understood against the background of the history of employment law in Nigeria. The next section will therefore recount the history of employment law in Nigeria, with a view to locating the position, if any, accorded to nonprofit sector workers in the process.

3.7.2 The Development of Employment Law in Nigeria

The history of employment law in Nigeria is linked to the growth of paid employment, as distinct from self-employment, which was the principal

¹³³ Awe, *op. cit.* at 262.

¹³⁴ Olorunyomi, *op. cit.* at 129-30.

¹³⁵ Ibhawoh, *loc. cit.*

labour practice in a subsistence political economy. The practice of paid employment took on prominence with the activities of explorers, missionaries, European merchants and colonial administrators in the early to mid-nineteenth century.¹³⁶ Explorers like Mungo Park and the Lander brothers hired guides and carriers for their luggage, European merchants traded with local traders, mainly in palm oil and colonial administrators needed a combination of services to set up administrative networks.¹³⁷ With the charter of the Royal Niger Company in 1886, the construction of roads, railways, telegraph lines and harbours, resulting in increased trade and the opening up of the hinterland in the early 20th century, the demand for paid labour increased.¹³⁸ While the practice of paid employment was growing in leaps and bounds in the commercial sector, the nucleus of public service was constituted by the small staff of John Beecroft who was appointed the first Consul in 1849, together with early colonial recruits following the cession of Lagos in 1861.¹³⁹

While there were fragments of legislation in various forms affecting the recruitment and treatment of native labour before the amalgamation of the protectorates of Northern and Southern Nigeria in 1914, the first major piece of labour legislation was the Master and Servants Ordinance of 1917. This was however, no more than a rudimentary labour code governing such things as the recruitment of labour, conditions of employment, method of payment and the use of native carriers.¹⁴⁰ Labour statutes relating directly to certain occupational activities more readily emerged. For instance, the Minerals Ordinance 1923 made provision for the payment of compensation to certain categories of mining labourers injured in the course of employment.

¹³⁶ See K. Dike, *Trade and Politics in the Niger Delta 1835–1885* (Oxford: Clarendon Press, 1986)

¹³⁷ W. Ananaba, *The Trade Union Movement in Nigeria* (Benin City: Ethiope Publishing Corporation, 1969).

¹³⁸ *Ibid.* at 4.

¹³⁹ *Ibid.* at 2. See also J.N. Egwummuo, *Modern Trends in Administrative Law* (Enugu, Nigeria: Rojoint Communications Services Ltd., 2000) pp.16-17.

¹⁴⁰ T.M. Yesufu, *The Dynamics of Industrial Relations: The Nigerian Experience* (Ibadan: University Press Ltd. 1982) chapter 4.

In 1929, the Labour Ordinance was enacted. This legislation was in substance an updated restatement of the Master and Servants Ordinance. It was updated in the sense that it took account of the evolution of wage labour in Nigeria which was becoming more widespread and stabilised. The 1929 Ordinance also reflected international influences emanating from Conventions of the International Labour Organisation (ILO) which was established in 1919, and of which Britain was a founding member.¹⁴¹ Following the adoption of the Forced Labour Convention by the ILO in 1930, Britain declared the Convention applicable to most of its colonial territories, including Nigeria. In consequence, the Forced Labour Ordinance of Nigeria was enacted in 1933. This marked the beginning of the breakdown of the resistance that the colonial government had shown to the implementation of what it termed 'civilised standards in a predominantly primitive society.'¹⁴² From 1938 onwards, there was a marked increase in employment legislation, culminating in the enactment of the Labour Code in 1945.¹⁴³

These commercial and public service origins of paid employment greatly influenced the character of employment legislation in Nigeria. Consequently, the bulk of employment legislation in Nigeria was not created with the nonprofit sector in view. This is even less so than the associational and registration provisions earlier discussed.¹⁴⁴ Current statutory language in employment law, as shall be seen, defines 'employer' and 'employee' or 'worker' in terms that denote commercial sector or public service employment.¹⁴⁵ The next section therefore focuses on the application of employment law to the nonprofit sector.

¹⁴¹ Ibid. at 52.

¹⁴² Ibid. at 53.

¹⁴³ Other statutes that emerged at this period were the Trade Unions Ordinance 1938, the Workmen's Compensation Ordinance 1941, the Trade Disputes (Arbitration and Inquiry) Ordinance 1941, the Wage Fixing and Registration Ordinance 1943.

¹⁴⁴ See Ch. 3.5 and 3.6 respectively.

¹⁴⁵ See for instance the definition of 'worker' in s.91 Labour Act 1990.

3.7.3 Employment Law in the Nonprofit Sector in Nigeria

In this section, the body of statutes applicable to private sector employment in Nigeria including employment in nonprofit organisations will be identified. Since the laws relating to employment in general are found in a variety of locations, the task in this section is to assemble a compendium of sources of employment law applicable to the nonprofit sector.

The scope of application of certain key statutes applicable to employment in the private sector is examined. In respect of labour or employment contract and working conditions, the coverage of the Labour Act 1974,¹⁴⁶ and the Wages Boards and Industrial Councils Act 1973¹⁴⁷ are discussed. With regard to trade unions and labour relations, the application of the Trade Unions Act 1973¹⁴⁸ and the Trade Disputes Act 1976¹⁴⁹ are described. In respect of safety, health and social security, the coverage of the Factories Act 1987¹⁵⁰, the Workmen's Compensation Act 1987¹⁵¹ and the Nigeria Social Insurance Trust Fund Decree 1993¹⁵² are examined.

It must be observed that statutes governing private sector employment do not use a uniform term in defining the workers who are covered by their provisions, a drafting practice which has been criticised as being capable of introducing confusion.¹⁵³ The terms 'worker', 'workman' and 'employee' are used by different statutes, and defined in varying terms, as shall be seen next. Furthermore, the dearth of case law on the scope of coverage of employment statutes means that much of the work in this area relies on secondary sources such as the opinions of text writers, and where appropriate, foreign cases.

¹⁴⁶ Cap. L1 Laws of the Federation of Nigeria (LFN) 2004.

¹⁴⁷ Cap. W4 LFN 2004.

¹⁴⁸ Cap. T14 LFN 2004.

¹⁴⁹ Cap. T8 LFN 2004.

¹⁵⁰ Cap. F1 LFN 2004.

¹⁵¹ Cap. W6 LFN 2004.

¹⁵² Cap. N88 LFN 2004.

¹⁵³ See S. Erugo, *Introduction to Nigerian Labour Law* (Lagos: Mikky Communications, 1998) p.6.

3.7.4 Employment Contracts and Working Conditions

Legislative intervention in the area of contracts of employment between the employer and the employee has been commended as an exercise by government of its responsibility to pursue social justice necessary for the maintenance of social stability and cohesion.¹⁵⁴ This is considered to be a departure from the faulty common law notion of equality of parties to the employment contract.¹⁵⁵

(a) *Labour Act 1974*¹⁵⁶

The Labour Act is regarded as the principal labour statute in private sector employment in Nigeria, which prescribes the minimum terms and conditions of employment in the private sector. The Act provides for a variety of employment issues, including hours of work, sick leave, payment of wages, termination of employment as well as provisions for special categories of workers such as women, young persons and apprentices.¹⁵⁷ The Act applies primarily to persons who come within the definition of 'worker' or 'employer' in the Act. A worker is defined as:

*'any person who has entered into or works under a contract with an employer, whether the contract is one for manual labour or clerical work or is expressed or implied or oral or written, and whether it is a contract of service or a contract personally to execute any work or labour.'*¹⁵⁸

The provision goes on to exclude from the definition, the following persons:

- a. any person employed otherwise than for the purposes of the employer's business or
- b. persons exercising administrative, executive, technical or professional functions as public officers or otherwise, or
- c. members of the employer's family or

¹⁵⁴ E.E. Uvieghara and C.K. Agomo, 'The Changing Pattern of Employer-Employee Relations in Nigerian Labour Law: Fact or Fiction' in (Adeogun and Omotola, Eds.), *Law and Development*, (Lagos: Faculty of Law University of Lagos,), pp. 24 and 27.

¹⁵⁵ Ibid.

¹⁵⁶ Formerly Cap. 198 Laws of the Federation of Nigeria (LFN) 1990, now Cap. L1 Laws of the Federation of Nigeria (LFN) 2004.

¹⁵⁷ Labour Act 1974, ss.1-20 and 49-64.

¹⁵⁸ S. 91.

- d. representatives, agents and commercial travellers in so far as their work is carried on outside the permanent workplace of the employer's establishment; or
- e. any person to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, repaired or adapted for sale in his own home or on other premises not under the control or management of the person who gave out the articles or the materials; or
- f. any person employed in a vessel or aircraft to which the laws regulating merchant shipping or civil aviation apply.¹⁵⁹

Thus the Labour Act applies to those workers who render service of a clerical, manual or similar nature under a contract of service. This extends to workers who perform such work in the public service, but does not include independent contractors. It has been observed that the exclusion of the class of workers in item (b) is superfluous since such workers are already excluded by the definition of 'worker', by virtue of the fact that they are neither employed for manual labour nor clerical work.¹⁶⁰

Further, the clause 'whether it is a contract of service or a contract personally to execute any work or labour' in the definition of worker is viewed in some quarters, as extending the coverage of the Act to persons who may be described as self-employed persons or independent contractors, notwithstanding the exclusion in item (e).¹⁶¹ If this position is accepted and bearing in mind the limitation of the Act to clerical workers and manual labourers, then that would have the effect of admitting, in the case of a nonprofit organisation, those persons who are hired on an ad hoc basis to keep clerical records, and perhaps even, casual labourers who are hired for maintenance work on the organisation's premises.

From the definition, it seems that a worker who is employed for manual labour and clerical work in any establishment, including a nonprofit agency, is covered by the Act, as nothing in the provision suggests otherwise.

¹⁵⁹ Ibid.

¹⁶⁰ E.E. Uvieghara, 'The Labour Decree 1974 – A Review' in *Nigerian Law Journal* p.63 at 65.

¹⁶¹ Ibid. at 66. See however *Westall Richardson Ltd. v. Roulson* [1954] 2 All E.R. 448 at 451 where Vaisey J. held that a 'contract to execute any work or labour' is not a contract of service and yet does not cover an independent contractor.

The Act however does not specify whether its provisions apply to part-time workers as much as they do to full time employees, nor does it state the minimum duration for an agreement to amount to a contract of employment. It is however submitted, based on the decision in *Technoplastic Ltd. v. Sule Jatau*¹⁶² that in certain cases the Act may apply with as much force to both categories of employees. In that case, the respondent was a casual worker who worked an average of three days a week. He suffered the loss of three fingers while operating a factory machine, which led to a permanent partial incapacity. Although the action was not brought under the relevant statute then in force, namely the Workmen's Compensation Act 1942 (WCA), the Supreme Court, affirming the decision of the Court of Appeal, held that the respondent was entitled to damages commensurate to the loss suffered. The definition of 'workman' under the WCA 1942 was on all fours with the definition of 'worker' in the Labour Act.

It is clear however that the Labour Act 1974 does not cover workers of a managerial cadre as established in the case of *Olaja v Kaduna Textiles Ltd*,¹⁶³ where the Court had to interpret a similar definition given to the term 'worker' in the Labour Code Act 1958, predecessor to the 1974 Act. In that case, the plaintiff was employed by the defendants for eleven years, during which time he rose from the position of a weaver to an over-looker. He was dismissed without notice and without pay in lieu of notice. There was no written agreement governing his employment. The issue before the court was whether the position of an over-looker was that of a worker governed by the provisions of the Labour Code Act 1958 or of a managerial class, governed by the rules of common law in the absence of any written agreement. It was held, inter alia, that, by virtue of the definition of 'worker' in section 2 of the Labour Code Act 1958,¹⁶⁴ a manager was not a 'worker' under the Act, and that by the nature of his responsibility, the plaintiff was of a managerial class.

¹⁶² (1986) 2 NWLR 771.

¹⁶³ (1972) 2 UILR 1.

¹⁶⁴ The definition of 'worker' in s.91 of the Labour Act 1974 is on all fours with that in s.2 of the 1958 Act.

That being so, it was further held that in the absence of any specific agreement, the measure of damages for his wrongful dismissal must be governed by the rules of common law. Accordingly, six months was held to be a reasonable length of notice for an employee in the plaintiff's position.

By implication therefore, workers covered by the Labour Act 1974 are those who work in occupations that fall within the same genus as those specified in the definition, that is, manual labour and clerical work, which are largely unskilled non-professional occupations. The recognition of unwritten contracts under the Act has informed the view that the inception of employment is governed by common law, while the Labour Act supplies the key terms of the contract.¹⁶⁵ Nevertheless, a written contract of employment goes a long way in removing ambiguity in any determination of the terms and conditions of the contract. Indeed, statutory forms of contract of service and other agreements are contained in the schedule to the Act.¹⁶⁶

The effect of the Labour Act jurisprudence on nonprofit sector employment, it is submitted, is that while workers whose occupation is of a clerical or manual nature are covered by the Labour Act, workers of a managerial level are not. Perhaps because of its application to a limited category of workers, the Labour Act has been criticised as having received only scant attention from scholars and trade unionists.¹⁶⁷

(b) *Wages Boards and Industrial Councils Act 1973*¹⁶⁸

Another key statute intended to protect private sector employees is the Wages Boards and Industrial Councils Act 1973. This Act provides for the establishment of an industrial wages board to prescribe minimum wages and conditions of employment in respect of particular industries. The industries covered by this Act are not fixed, but rather, are determined where the Minister is of the opinion that wages are unreasonably low and that no

¹⁶⁵ Uvieghara, op. cit. at 69.

¹⁶⁶ See Labour Act 1974 Schedule, Forms A, B and C, which provide precedents for the general contract of service, foreign employment and deed of apprenticeship respectively.

¹⁶⁷ B. Aturu, *A Handbook of Nigerian Labour Laws* (Lagos: Friedrich Ebert Stiftung, 2001), p.180.

¹⁶⁸ Formerly Cap. 466 LFN 1990, now Cap. W4 LFN 2004.

adequate machinery exists for the effective regulation of wages or other conditions of employment of workers in that industry.¹⁶⁹ The Governor or the appropriate member of the Executive Council of a State is also empowered to make such an order establishing an industrial wages board for workers in a particular industry within the state, and for local government workers.¹⁷⁰ The powers conferred by these provisions may be exercised by reference to a Commission of Inquiry to determine whether an industrial wages board should be established in each case.¹⁷¹

The establishment of an industrial wages body is not the exclusive initiative of the Minister or the State authorities. It is also provided that employers and workers in an industry may establish a joint industrial council for the purpose of negotiating and reaching agreements on matters of concern to either party in the industry.¹⁷² Such an industrial council shall register its constitution and functions with the Minister, as well as any agreement on wages or conditions of employment for any specified group of workers in the industry. The Minister may then make an order declaring the provisions of any such agreement binding on the workers to whom they relate.¹⁷³

It appears from these provisions that this Act applies generally to workers in private sector employment, including the informal sector. This is because the term 'industry' is defined in the Act in a way that generally embraces small, medium and large scale endeavours in the private sector. 'Industry' is defined by the Act to include 'trade, commerce and groups of occupations or services.'¹⁷⁴ Specifically, subsidiary legislation to this Act include Orders regulating wages and conditions of employment for workers in various industries, including retail trading, tailoring, printing, motor

¹⁶⁹ Wages Boards and Industrial Councils Act 1973, s.1(1). Section 27 of the Act defines 'Minister' as the Minister for Employment, Labour and Productivity.

¹⁷⁰ Ibid. s.2.

¹⁷¹ S.3.

¹⁷² S.18(1).

¹⁷³ S.18(2) and (3).

¹⁷⁴ S.27.

industry trade, stevedoring and dock labour, catering trade, building and civil engineering industry.¹⁷⁵

It is submitted that the clause 'groups of occupations or services' brings subsectors of the nonprofit sector within the purview of this Act. In other words, distinct types of activities in the nonprofit sector constitute subsectors each of which may be classified as an industry. For instance, a family service industry may be constituted by nonprofit organisations which offer shelter and legal services to victims of domestic violence and other forms of abuse, while those agencies that work on rehabilitation and skills acquisition for young people may constitute a youth development industry. It is however debatable whether the management of organisations in the nonprofit sector would submit the terms of their employment to government influence even if that influence is designed to improve working conditions in the sector. As earlier discussed, the independence of the nonprofit sector from government influence is perceived as critical to the credibility and success of the former.¹⁷⁶ Government-nonprofit partnership is more favourably viewed by the nonprofit sector as the latter monitoring and assisting the former, not the other way round.¹⁷⁷

The next subsection focuses on collective forms of employment relations through trade unions, with a view to determining the extent to which the provisions of the relevant laws facilitate the work of the nonprofit sector.

3.7.5 Trade Unions and Labour Relations Legislation

a. Trade Unions Act 1973¹⁷⁸

The Trade Unions Act 1973 (TUA) makes provision for the formation, registration and organisation of trade unions, federations of trade unions and the Central Labour Organisation. In the TUA, a trade Union could either be a

¹⁷⁵ Most of these Orders were inherited from the preceding statute, the Wages Board Act 1957, which was itself preceded by the Wage Fixing and Registration Ordinance 1943.

¹⁷⁶ See 1.2 supra on characteristics of nonprofit organisations.

¹⁷⁷ See Awe, op. cit. at 264. See also discussion on government-nonprofit relations in 5.4.1.

¹⁷⁸ Formerly Cap. 437 LFN 1990, now Cap. T14 LFN 2004.

workers' union or an employers' union.¹⁷⁹ A trade union is required to be registered for it to be recognised and for it to be free to pursue the purposes for its registration. An unregistered trade union can only perform acts which are necessary steps to registration.¹⁸⁰ Further, the Registrar of Trade Unions may refuse to register a trade union for a number of reasons, including 'where the name contains reference to a personage, institution or is otherwise unsuitable.'¹⁸¹

Unlike the Labour Act, the definition of 'worker' in the Trade Unions Act does not limit the category of workers who might be covered. 'Worker' is defined as:

*'any employee, that is to say any member of the public service of the Federation or of a State or any individual (other than a member of any such public service) who has entered into or works under a contract with an employer, whether the contract is for manual labour, clerical work or otherwise, expressed or implied, oral or in writing, and whether it is a contract personally to execute any work or labour or a contract of apprenticeship.'*¹⁸²

It is submitted that the phrase 'or otherwise' broadens the scope of workers covered by the Act, as also observed by other authors.¹⁸³ This effectively averts the limited interpretation given by the decision in the earlier mentioned case of *Olaja v Kaduna Textiles Ltd.*¹⁸⁴

The establishments in respect of which unionism is prohibited include the Nigerian Armed Forces, the Customs and Excise Department, the Immigration Department and the Prisons Services, the Nigerian Security Printing and Minting Company, the Central Bank and the Nigerian Telecommunications¹⁸⁵ This means that all other workers, including public sector and nonprofit sector workers are covered.

The constitutional guarantee of freedom of association, as earlier discussed, means that workers may not be compelled to join a particular trade

¹⁷⁹ Trade Unions Act 1973 s.1 (1).

¹⁸⁰ Ibid. s.2(1).

¹⁸¹ s.5(4).

¹⁸² Trade Unions Act 1973 s. 52.

¹⁸³ See for instance, Erugo, op. cit. at 11.

¹⁸⁴ Supra, see the facts of the case in 3.7.4a supra.

¹⁸⁵ Trade Unions Act 1973 s.11(1).

union.¹⁸⁶ It seems, however, that for a worker to be exempt from trade union obligations, the worker must expressly contract out of the trade union system. In *Udoh & ors v. Orthopaedic Hospitals Management Board & Anor.*,¹⁸⁷ the Court of Appeal held that the deduction of check-off dues from workers' wages for payment to the relevant trade union as authorised by section 1(3) of the Labour (Amendment) Act 1978, was not based on membership of the trade union, but on eligibility for such membership. All that the employer had to determine was whether or not the worker in question was eligible for membership of the trade union which the employer had recognised. Therefore, workers who, as in this case, resigned from the trade union without contracting out of the system as provided by the section would still have check-off dues deducted from their wages if they were found eligible for membership of the trade union by their employer. The deductions made from the appellants' wages were accordingly held to be lawful.

(b) Trade Disputes Act 1976¹⁸⁸

This is the principal Act governing the resolution of trade disputes in Nigeria. The Act was amended by the Trade Disputes (Amendment) Decree 1992 to divest the regular courts of jurisdiction in trade dispute cases, and inter or intra union disputes. A trade dispute is defined as

*'any dispute between employers and workers or between workers and workers, which is connected with the employment or non-employment, or the terms of employment and physical conditions of work of any person.'*¹⁸⁹

The definition of 'worker' in the Trade Disputes Act differs from that in the Trade Unions Act only to the extent that independent contractors are excluded while all public officers are included. Again, nothing in the definition excludes nonprofit sector workers. Rather, the definition of collective agreement includes written terms and conditions of service between

¹⁸⁶ See 3.5 *supra*. See also Labour Act 1974, s. 9(6) of which makes it illegal for a contract of employment to require a worker to join or refrain from joining a trade union, or to inflict a disability on the worker because of membership or non-membership of a trade union.

¹⁸⁷ (1990) 4 NWLR (Pt. 142) 52.

¹⁸⁸ Formerly Cap. 432 LFN 1990, now Cap. T8 Laws of the Federation of Nigeria 2004.

¹⁸⁹ Trade Disputes Act s.47.

an employer on the one hand, and the duly appointed representative of any body of workers on the other hand.¹⁹⁰ Ordinarily, this suggests that where such a document exists in a nonprofit sector establishment, disputes between the management and employees may be referred to the Industrial Appeals Panel. The difficulty in applying this provision to employment relations in the nonprofit sector however, is that the employer is usually a legal entity representing, not investors or owners of the company in a commercial sense, but recipients of the services provided by the organisation. Like many others, it is obvious that this employment statute does not primarily have nonprofit sector workers in view. From another dimension however, trade unions can be seen as civil society formations at the workplace, and have indeed been described as 'by far the most organised and structured element of "civil society"'.¹⁹¹ Trade unionism is long recognised as a core field of study, and the present study is more concerned with other nonprofit formations of civil society.

3.7.6 Safety, Health and Social Security Legislation

(a) Workmen's Compensation Act 1987¹⁹²

The Workmen's Compensation Act 1987 (WCA) replaced the Workmen's Compensation Act 1942, and like its predecessor, codifies the common law principle of employer's liability into a statutory obligation. The aim of the Workmen's Compensation Act 1987 is to provide for the payment of compensation to workers who sustain injuries in the course of their employment. Before the Act came into existence, unless the employer was at fault, the employee could not successfully claim compensation for such injuries.¹⁹³

¹⁹⁰ S.47(1).

¹⁹¹ V. Ntandayarwo, 'The Role of Trade Unions in Poverty Alleviation: Priority Agenda for the 21st Century' in (M. Mwamdzingo and D. Saleshando Eds.), *Trade Unions and Poverty Alleviation in Africa* (Geneva: International Labour Office Bureau for Workers' Activities, 2003) p.33.

¹⁹² Formerly Cap. 470 LFN 1990, now Cap. W6 LFN 2004.

¹⁹³ Aturu, op. cit. at 405.

Under the WCA 1987, liability to pay compensation rests entirely on the employer. Nothing stops an employer from taking out an insurance against liability, but it is the opinion of authors that where the liability of the insurers to the worker is less than that of the employer, it is likely that the worker may succeed in a claim for the balance in the liquidation or recover it from the receiver or manager as the case may be.¹⁹⁴ The duty to insure every worker against injury or death arising out of and in the course of employment may be made compulsory for certain categories of employers by the Minister of Labour by means of regulations to that effect.¹⁹⁵ The provisions of the Act operate to provide an injured worker with an income during the period of a temporary incapacity, and to provide compensation to the dependants of a deceased worker as well as for a permanent disability, which may be total or partial.¹⁹⁶

The Act applies to every person 'working under a contract of service or contract of apprenticeship with an employer whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, is oral or in writing.'¹⁹⁷ This is a broader definition than those given in the earlier statutes in the sense that it covers apprentices and does not limit its provisions to manual and clerical-type workers. Further, the Act gives a broad definition of 'employer', which includes the Federal and State Government, any body of persons corporate or non-corporate and the legal personal representative of a deceased employer.¹⁹⁸ Nevertheless, the Minister may approve certain contracts of employment or collective agreements for exemption from the provisions of the Act.¹⁹⁹ The Act also excludes a person employed otherwise than for the purposes of the employer's trade or

¹⁹⁴ B.O. Nwabueze, *Social Security in Nigeria* (Lagos: Nigerian Institute of Advanced Legal Studies, 1989) p.41.

¹⁹⁵ Workmen's Compensation Act s.40(1).

¹⁹⁶ See compensation provisions in ss.4-10.

¹⁹⁷ WCA, s.1(1).

¹⁹⁸ S. 41(1).

¹⁹⁹ S. 1(2). So far, no such exemption has been published in a gazette.

business.²⁰⁰ This provision appears to remove domestic workers from the coverage of the WCA.

Other workers covered by the WCA are employees of the Nigeria Police Force and persons employed in a civilian capacity in the Nigerian Army, Navy or Air Force.²⁰¹ It is submitted that the clause, 'bodies corporate or incorporate' [sic] in the definition of employer brings nonprofit sector agencies within the provisions of the Act.

The WCA does not recognise any agreement that purports to reduce the liability of any person to pay compensation under the Act.²⁰² In other words, parties to an employment contract are prevented from contracting out of the provisions of the Act. It is submitted therefore, that in the light of the provision against contracting out, nonprofit sector employees are covered by this provision for injuries sustained in the course of their employment, both within the WCA and at common law.

In *Obere v. Board of Management, Eku Baptist Hospital*,²⁰³ the appellant was employed by the respondent, a nonprofit missionary hospital in mid-western Nigeria, as a boiler and steam operator. In that capacity, he was obliged to operate a defective machine which he had repeatedly complained to the respondents about. While operating the machine, on one occasion, his right thumb was cut off. The appellant sued, not for breach of a statutory duty under the WCA, but for damages at common law. His action was successful at the High Court, but he was awarded only minimal damages. On further appeal to the Supreme Court, the sum was significantly increased on the consideration that the appellant's pecuniary loss for his personal injuries would be his loss of earnings, or more strictly, a sum representing his loss of future earning capacity. It was observed in that case that the appellant could have maintained an action under the WCA 1942 that was then in force.

²⁰⁰ S. 1(2).

²⁰¹ Ss. 2(1) and 2(2)(a).

²⁰² S.27(1).

²⁰³ (1978) 6-7 SC 15.

The disadvantage of limiting an action to a claim for damages at common law is that the burden of proof of negligence on the part of the employer may be more difficult to discharge than if a claim for breach of a statutory duty was made. In *International Institute of Tropical Agriculture v. Amrani*,²⁰⁴ the respondent, in the course of his duties as an employee of the appellant, a nonprofit research establishment located in Ibadan, south-west Nigeria, rode a moped motorcycle belonging to the appellant into a deposit of sand left by the latter along the tarred road within its premises. In the resulting accident, the plaintiff was severely injured on the head, arm and collarbone. It was not in dispute at the trial that the road formed part of the employee's means of access which the employers were duty bound to keep safe. However, the plaintiff's claim was not based on breach of a statutory duty, and he was held by the Court of Appeal to have failed to establish negligence on the part of his employers. Consequently, the judgment of the trial court awarding damages to the plaintiff was reversed.

(b) *Nigeria Social Insurance Trust Fund Act 1993 (NSITF Act)*²⁰⁵

The Nigeria Social Insurance Trust Fund (NSITF) was established to replace the National Provident Fund established by the National Provident Fund Act 1961 (NPF). The NPF was critiqued as offering benefits that were far below the minimum international standards for a social security scheme.²⁰⁶ The NSITF scheme was designed for the enhanced protection of workers in the private sector of the economy against the loss of employment income in the event of old age, invalidity and death. The scheme also covers public service workers who are not covered by any pension scheme.²⁰⁷

²⁰⁴ (1994) 3 NWLR (Pt.332) 296.

²⁰⁵ Cap N88 LFN 2004.

²⁰⁶ Nwabueze, op. cit. at 27.

²⁰⁷ See NSITF Act 1993 s.44 which excludes from the purview of the Act public service employees who are entitled to any scheme or pension on terms substantially similar to those prescribed by the Pensions Act.

The Act applies to every employee of a company, partnership or any other employer employing five or more workers.²⁰⁸ The existence of a private pensions scheme in respect of workers to whom the Act applies does not exempt an employer or employee from the provisions of the Act.²⁰⁹ All employers and employees to whom the Act applies are required to register with the NSITF Management Board in the prescribed manner.²¹⁰

The Act provides for the payment of retirement benefits made up of retirement grant and retirement pension; invalidity benefits made up of invalidity grant and invalidity pension; survivor's benefits comprising funeral grant, survivor's pension and survivor's grant. After more than ten years of its existence, the NSITF plans to introduce frictional unemployment benefits.²¹¹

Contributions to the Fund is currently fixed at ten per cent of the employee's insurable monthly earnings, at a rate of 3.5 percent by the employee and 6.5 percent by the employer.²¹² Failure to pay contributions by employers to whom the Act applies is a strict liability offence, as nothing is said of intent to default.²¹³ Indeed, from available cases, it is clear that private sector employers are in violation of the provisions of the Act simply by failing to register with the Fund, whether or not there is proof of intent to default. In *NSITF Management Board v. Izzi Community Bank Nig. Ltd. And Anor.*,²¹⁴ the defendants were charged with failing to register with the NSITF. On compliance with the registration requirement by the employer however, the case was struck out. This is usually the pattern with cases prosecuted under the NSITF Act. Typically, employers, realising that they are strict liability offenders, try to cut their losses by complying with statutory requirements or

²⁰⁸ NSITF Act 1993 s.10(1).

²⁰⁹ S.10(3).

²¹⁰ S.10(2).

²¹¹ See interview with the Managing Director of the NSITF reported in *The Vanguard* (Nigerian newspaper) of October 24, 2002. See also the website of the NSITF: <http://www.nsitf.com>.

²¹² Nigeria Social Insurance Trust Fund Act 1993 Rates of Contribution (Revision) Order 2000, S.I.42 of 2000.

²¹³ NSITF Act, ss.14(1) and 20(a).

²¹⁴ Unreported Chrg No. FHC/EN/C/181c/2001, decided on 28/2/2002.

offering to settle their indebtedness out of court.²¹⁵ This makes for a dearth of conclusively litigated cases on the provisions of the Act.

By a simple construction of the NSITF Act, employees of nonprofit organisations come within its provisions. Indeed some nonprofit organisations visited in the course of the research had registered their workers with the NSITF.²¹⁶

3.7.7 Other Sources of Legal Regulation of Nonprofit Sector Employment

The statutes discussed above provide the statutory framework within which employees render their service in employment relationships in the private sector. These provisions constitute the minimum terms and conditions for employment contracts in this sector. Nevertheless, the basis of the employment relationship is the contract of employment, which may be written or oral, and which sets out express terms and conditions of employment, supplemented by implied terms and conditions.²¹⁷

One common omission in all the statutes examined however, is that no distinction is made between part time and full time employees. It does appear however from the limited case law, what matters is that an agreement amounting to a contract of employment exists between the parties. Thus, in the case of *Technoplastic Ltd. v. Sule Jatau*²¹⁸, the Supreme Court, affirming the decision of the Court of Appeal, held that the respondent was entitled to damages commensurate to the loss suffered, notwithstanding that the plaintiff respondent was a casual worker.

In a contract of service concluded in Nigeria, implied terms and conditions of a contract of service are inferred by the common law, and are often referred to as 'common law implied terms'. Unless expressly prohibited in a contract of employment or by statute, these terms apply to all

²¹⁵ This was the situation in *NSITF Management Board v. Christopher Ugwu*, Unreported Charge No. FHC/EN/C/60c/2000, decided on 5/3/2003, and *NSITF Management Board v. Nigeria Starch Mill Ltd. & Anor.*, Unreported Charge No. FHC/AN/10c/95, decided on 20/6/96.

²¹⁶ See Appendix E, item (v).

²¹⁷ G.O.S. Amadi, *A Legal Guide to Trade Unions* (Nsukka, Nigeria: Afro-Orbis Publishers, 1999) pp. 112-3.

²¹⁸ *supra*.

employment relationships for the duration of the contract of employment.²¹⁹ These terms have been judicially recognised in Nigeria for decades, following precedents set in a string of English cases.²²⁰

Implied terms and conditions on the part of the employer include the employer's duty to provide work in certain circumstances, pay remuneration for work done, indemnify the employee for expenses incurred in the course of employment, and not to breach the contract of employment without good cause.²²¹ On their part, employees have the duty to exercise reasonable care and skill, obey lawful and reasonable orders, render faithful service, and account for all money and property received in the course of employment.²²²

With regard to employment in a nonprofit sector establishment therefore, it follows that an employee's service is governed by the contract of employment, the applicable statutes and the common law implied terms and conditions of employment. The ways in which these sources of private sector employment law apply to employment in the nonprofit sector constitute a point of legal intersection with nonprofit activity which this work seeks to draw attention to.

3.8 Conclusion

The chapter started out with an introductory section that highlighted the contents of chapter two, and then proceeded to discuss the growth of the nonprofit sector in Nigeria. The human rights - cum civic-advocacy organisation was selected as a key type of the modern nonprofit organisation in Nigeria and on this basis, various stages in the development of the contemporary nonprofit sector in Nigeria were described.

²¹⁹ Amadi, op. cit. at 113.

²²⁰ See for example, the English cases of *Lister v Romford Ice and Cold Storage Co. Ltd* [1951] AC 555, *Laws v London Chronicle Ltd.* [1959] 2 All ELR 285, *Faccenda Chicken Ltd. v Fowler* [1986] 1 All ER 617 and the corresponding decisions of the Nigerian Supreme Court in *Alrain (Nig) Ltd v Eshiett* (1977) 1 SC 89, *Sule v Nigerian Cotton Board* [1986] 2QLRN 102 and *College of Medicine of University of Lagos v Adegbite* [1973] 1 NMLR 361.

²²¹ Amadi, loc. cit.

²²² Ibid.

Theories around the subject were discussed. These included the government failure theory, the international relations theory, theories centred around the north-south socio-economic divide and the dynamics of rights recognition by the United Nations. Linked to all this was the nationalist agenda which moved from the push for representative governance in the early twentieth century to self-determination and human rights in the mid-twentieth century. Ultimately, the limitations of omnibus human rights promotion led to the establishment of specialised organisations dedicated to human rights enforcement.

Following the theoretical discourse, contemporary developments in the Nigerian nonprofit sector were examined. The spotlight at this point was on the political changes in Nigeria that saw the focus of nonprofit organisations, typically those involved in human rights and pro-democracy activities developing their institutional capacity to take on board other processes such as legislative advocacy and collaborative projects with state institutions in addressing issues of democratic consolidation. The activities of umbrella groups of civil society organisations such as the Transition Monitoring Group, the Citizens' Forum for Constitutional Reform and international partners such as the International Institute for Democracy and Electoral Assistance were mentioned in connection with this.

Following this, the legal provisions for establishing a nonprofit organisation as a legal entity in Nigeria were highlighted, the two key ways being registration as a company limited by guarantee and registration as an incorporated trustee.

The chapter then moved on to examine the character of employment relations in the nonprofit sector. Minimal attention was found to have been paid to this subject, but indicators of its importance were evident in some of the literature.²²³ This was done in the context of the history of employment law in Nigeria, which linked its development to the commercial and public service activities of European explorers, merchants and the colonial

²²³ Oroh(1997), Awe(1997) and Ibhawoh (2001).

government. These origins of paid employment and labour law defined the character of early labour legislation such that none was designed categorically for nonprofit activity.

The study then proceeded to identify the key statutes on private sector employment to determine the coverage extended to employees in the nonprofit sector. It was found that the two core statutes relating to labour contract and working conditions apply to nonprofit sector employment. While the Labour Act 1974 applies to non-managerial staff, specifically to unskilled and semi-skilled employees, the Wages Boards and Industrial Councils Act 1973 applies to all employees.

With regard to statutes on trade unions and labour disputes, it was found that the definition of worker in the Trade Unions Act 1973 and the Trade Disputes Act 1976 admits of nonprofit sector employees. In respect of safety, health and social security legislation, it was found that both the Workmen's Compensation Act 1987 and the Nigeria Social Insurance Trust Fund Act 1993 cover nonprofit sector employees.

Other sources of employment law in nonprofit sector employment were described, the primary ones being the express contract of employment and the common law implied terms and conditions of employment.

Thus, in addition to the theoretical discourse on the development of the nonprofit sector, this chapter has endeavoured to bring out in clearer relief, the legal framework for establishing a nonprofit organisation as well as the body of employment laws applicable to the nonprofit sector in Nigeria. In the next chapter, the South African nonprofit sector will be discussed along similar lines.

CHAPTER FOUR

LAW IN THE DEVELOPMENT OF THE NONPROFIT SECTOR IN SOUTH AFRICA

4.1 Introduction

Having introduced and justified the subject-matter of the thesis in chapter one, by describing the imperative of research on legal issues in the nonprofit sector, chapter two reviewed the theoretical basis for nonprofit activity within a law and development context, while chapter three examined the growth of the Nigerian nonprofit sector, using the human rights and civic-advocacy organisation as the unit of analysis. The choice of the civil society organisation for the Nigerian study was based on the rise of this type of nonprofit organisation in prominence and visibility during the extended period of military rule. Legal issues relating to various aspects of nonprofit activity in Nigeria were also discussed in chapter three.

This chapter proceeds to examine the nonprofit sector in South Africa with a view to defining its character, and identifying the role played by law in shaping the sector. To do this, the study starts by describing the growth of the modern nonprofit sector in South Africa, tracing how the sector as it currently exists, has been influenced by the major epochs in the country's recent history. This is followed by a study of the legal framework for nonprofit activity in three specific areas, namely, legally permissible purposes of association; registration and tax provisions and employment regulation. The chapter concludes with a synthesis of the processes through which law has contributed to the operational environment of the nonprofit sector in present-day South Africa.

4.2 The Growth of the Current Non-Profit Sector in South Africa

Virtually every recent socio-political subject of academic interest in South Africa follows a three-stage trajectory that starts with the apartheid era, followed by the transition years and the post-apartheid period respectively. While all epochs are

reflected in this section, the focus is on the process by which civil society activity, expressed through nonprofit forms of organisations, has been affected by the dynamics of the transition period in South Africa. The term 'nonprofit organisation' is used interchangeably with 'civil society organisation', 'nongovernmental organisation' and other variants of these terms used in the literature depending on the context.

4.2.1 The Apartheid Era

The apartheid era is generally perceived as one that was hostile to independent activities of civil society, especially in non-white communities. For one, government appropriated to itself by means of law, broad powers of control over fundraising as well as powers to investigate and halt nonprofit organisations perceived as opposing the government.¹ While state discretion in granting fundraising permission by means of a fundraising number was more easily exercised in favour of applicants working in traditional welfare fields like early childhood education and services, it was harder with organisations perceived as political or in competition with government.² Within this constraining legal environment, many organisations ignored the fundraising provisions in the conduct of their activities.³

Another feature of nonprofit activity at this time, linked in part to the point mentioned above, is that the anti-apartheid struggle gave nonprofit organisations relatively easy access to funding from countries sympathetic to the cause. Since a significant portion of these funds came from countries in the northern hemisphere, the sector developed what has been described as an over

¹ Z. Dangor, 'Government-Civil Society Partnership in Policy Development: The Case of the Non-Profit Organisations Act in South Africa' in *Government-NGO Partnerships: Some Emerging Lessons and Insights* (Johannesburg: The Development Resources Centre, 1999) p.4; see also Fundraising Act 1978, s.2.

² Z. Dangor and the Development Resources Centre, *The Non-Profit Sector in South Africa* (Kent: Charities Aid Foundation, 1997) at 29-30.

³ H. Marais, 'Annual Review: The Voluntary Sector and Development in South Africa' in *Development Update* 1996-97 Vol.1 No.3 1997 p107; See also Dangor et al, op. cit. at 30.

dependence on 'northern funds'.⁴ While acknowledging the dominance of foreign funding, local sources of funding are also identified, mostly by way of some corporate organisations and churches underwriting expenses of the anti-apartheid movement.⁵

A third feature is that segregation laws spawned civil society reaction mainly in non-white communities as much as it served to enforce apartheid policies. This was particularly evident in relation to labour unions where constant contest between employers and workers characterised the apartheid era, especially in the 1960s and 70s. For instance, the 1956 amendment to the Industrial Conciliation Act 1924 served to prohibit the formation of mixed trade unions. The pressure brought by this resulted in the expulsion of black unions from the Trade Union Council of South Africa (TUCSA), which had been formed in 1954, and had begun to admit black unions into its membership in 1962, thus giving it, for a short time, in the sixties, the status of a multi-racial union. The systematic exclusion of black trade unions in general union bodies led to a rapid growth in unregistered black trade unions in the seventies.⁶

Corresponding developments occurred in other locations of civil society. For instance, the Black Consciousness Movement led by Steve Biko, influence a new generation of young activists in the mid-1970s.⁷ This movement significantly supplied the human resources instrumental to the resurfacing of the anti-apartheid movement in the early 1980s, as students and graduates so

⁴ Dangor et al, op. cit. at 24.

⁵ A. Habib, 'State-Civil Society Relations in Post-apartheid South Africa' in J. Daniel, A. Habib and R. Southall (Eds.), *State of the Nation: South Africa 2003 – 2004* (Cape Town: Human Sciences Research Council, 2003) p.231.

⁶ M. Finnemore, 'The History of Labour Relations in South Africa', Chapter 2 of M. Finnemore and V. Rensburg (Eds.) *Contemporary Labour Relations* (Durban: Butterworths, 1999) pp.34-5. See more on this in 4.5 infra.

⁷ R. Greenstein, V. Heinrich and K. Naidoo, *The State of Civil Society in South Africa: Past Legacies, Present Realities and Future Prospects* (Braamfontein: The Community Agency for Social Enquiry, CASE, 1998) p.17.

conscientised allied with freed political prisoners to establish civil society organisations to support these mass struggles in the early 1980s.⁸

In townships, civil associations set up alternative governance structures in the absence of legitimate elected structures and presided over processes such as land allocation and dispute settlement through people's courts.⁹ Many nongovernmental organisations at this time became surrogates for banned and exiled political organisations, sharing the immediate common vision of overthrowing the apartheid state.¹⁰ For example, the Mass Democratic Movement of the 1980s emerged as a 'collective of mass-based civic, youth and women's organisations in alliance with trade unions, service organisations, progressive professional bodies, and religious, sport and cultural bodies.'¹¹

On the other hand, the white population enjoyed the freedom to form associations and exert pressure on the state through institutionalised channels.¹² Consequently, racially exclusive nonprofit organisations involved in service delivery, culture and sport in white communities enjoyed a fairly stable interdependent relationship with the state.¹³ This does not mean that there was a complete absence of contest in white civil society, as certain institutions incurred state displeasure by dissenting from, or challenging the status quo. As Habib explains,

'Dominant elements in civil society before the liberalisation of the early 1980s were organisations and institutions that were either pro-apartheid and or pro-business. Agencies critical of the state and the socio-economic system were either actively suppressed or marginalised from the formal political process. The major political contest within civil society seemed to be between pro-apartheid institutions like the Broederbond and Nederduitse Gereformeerde Kerk (NGK)

⁸ Habib (2003), op. cit. at 31.

⁹ Ibid. at 18.

¹⁰ V. Saldanha, 'NGOs and the Promotion of Human Rights in South Africa' in Zeleza and McConnaughay (Eds.), op. cit. at 210.

¹¹ Ibid. at 210.

¹² Ibid. at 7.

¹³ M. Swilling and B. Russell, *The Size and Scope of the Non-Profit Sector in South Africa* (Co-published by the Graduate School of Public and Development Management, University of the Witwatersrand, The Centre for Civil Society and University of Natal, 2002) p.4.

and liberal oriented organisations like the Institute of Race Relations and the National Union of South African Students (NUSAS).'¹⁴

During the apartheid era therefore, the potential of law in promoting and hindering development processes, sometimes simultaneously, was demonstrated in the negative use to which apartheid state policies were put on one hand, and the resistance which their implementation generated on the other. Thus, while indigenous networks of civil society suffered under the severity of segregation laws, new forms of civil society activity, such as that found in labour, grew tremendously.

4.2.2 The Transition Period: 1990 - 1994

The transition period was a time for constructing the framework for the new South Africa, involving extensive consultations, negotiations, lobbying and dialogue between different interest groups, primarily the government, formerly exiled political groups and representatives of civil society. A fundamental role played by civil society organisations during this period was that by their involvement in managing the volatile pre-election climate, they strategically contributed to the success of the 1994 elections.¹⁵ Further, civil society were significantly instrumental to the inclusion of socioeconomic rights in the constitution drafting processes that commenced during this time.¹⁶ The transition process also exposed distinctions between opposition forces concerned primarily with the seizure of state power and forces that wished to remain rooted in civil society.¹⁷

The period 1993-94 saw the birth of the Reconstruction and Development Programme of the government (RDP), described as 'an integrated, coherent, socio-economic policy framework' to mobilize resources for the eradication of

¹⁴ Habib (2003), op. cit. at 230.

¹⁵ Dangor et al, op. cit. at 13.

¹⁶ Saldanha, op. cit. at 211.

¹⁷ Greenstein et al, op. cit. at 6.

the effects of apartheid and for building of a democratic, non-racial and non-sexist nation.¹⁸ Politically, the RDP was seen as 'the African National Congress's elections manifesto and up until 1995 the public face of the ANC government's development approach.'¹⁹ The main goal of the RDP was to enable historically disadvantaged communities to share equitably in the resources of the country and the fruits of its economic activity.²⁰ This was to be done through a multi-pronged approach that promoted capacity building among the most marginalised groups, participation of civil society organisations in the policy-making process, and an active role for civil society organisations in the implementation of the RDP.²¹

The RDP envisaged an active role for government in the provision of basic services such as housing, healthcare and education, which made up the thrust of the programme.²² In its process and content, the RDP reflected the influence of civil society, drawing heavily as it did, from the experience of nongovernmental organisations (NGOs) in participatory and collaborative development projects in disadvantaged communities.²³ Civil society expectation of the RDP was that economic growth would be guided through redistribution, with the state playing a leading role in partnership with 'its natural development allies', the development NGOs and the trade unions.²⁴

During the transition period, several concerns relating to the work of the nonprofit sector emerged. First, it still remained to be established whether the involvement of stakeholders in the transition process was a sign of lasting

¹⁸ Reconstruction and Development Programme (RDP) White Paper, article 1.1.1, accessed at http://www.polity.org.za/html/govdocs/white_papers/rdpwhite.html?rebookmark=1 on 19/1/2006.

¹⁹ Z. Dangor, 'The Changing Nature of the Partnerships between NGOs and Government' in *Government-NGO Partnerships: Some Emerging Lessons and Insights* (Johannesburg: Development Resources Centre, 1999) at 1.

²⁰ Ibid. at 16.

²¹ Greenstein et al, op. cit. at 26.

²² Dangor et al, op. cit. at 6.

²³ Greenstein et al, op. cit. at 25.

²⁴ Dangor et al, op. cit. at 1.

change to an inclusive policy process or merely the result or sign of compliance with specific transition requirements.²⁵

Secondly, it was obvious that the skills, structures and modes of interaction required for reconstruction were different from those required for political resistance with which South African civil society was much more familiar. The need for re-orientation to build the capacity of civil society organisations to cope with new roles was therefore a key concern of this period.²⁶

A third feature of the transition period was the recruitment of key leaders of civil society, into the ranks of the new government.²⁷ While this trend significantly depleted the seasoned crop of the nonprofit sector's human resources, it reinforced the positive role of the nonprofit sector as the 'chief training grounds for state personnel.'²⁸ Activist leadership and staffing had therefore to be replaced with career-oriented professionals recruited from the open market on salaries competing with business and public sector.²⁹

A fourth challenge to the nonprofit sector which came with the dismantling of apartheid was the loss of a vital rallying point which the anti-apartheid struggle had provided. It became necessary, for the rebuilding of cohesion in the sector, to identify another point of convergence for the activities of diverse groups of nonprofit organisations. The South African National NGO Coalition's Campaign Against Poverty and Inequality was initiated mainly in response to the need to replace the 'cohesive function of the anti-apartheid struggle with a compelling anti-poverty vision.'³⁰

Thus the transition period was characterised by fundamental changes in the South African political economy, which had ripple effects on the non-profit sector. The end of apartheid as a state policy did not automatically mean the end

²⁵ Greenstein et al, op. cit. at iv.

²⁶ Ibid.

²⁷ Saldanha, op. cit. at 244.

²⁸ Marais, op. cit. at 116.

²⁹ G. Kraak, 'The South African Voluntary Sector in 2001: A Great Variety of Morbid Symptoms' in *Development Update* Vol. 3 No.4, 2001 at 129.

³⁰ Marais, op cit. at 120-1. See also Greenstein, op. cit. at 66.

of transition. While the culmination of the transition programme of the early 1990s in the 1994 general elections may have signalled the end of the formal political transition, it is submitted that in a very real sense, South Africa's socio-economic patterns are still in transition and the current post-apartheid state represents one stage in the unfolding process of change.

4.2.3 The Post-apartheid Period

Shortly after the formal end of apartheid, specifically, two years after the historic 1994 elections, the new government adopted the Growth Employment and Redistribution Strategy (GEAR). Introduced in 1996, the GEAR document described the programme as '[a] strategy for rebuilding and restructuring the economy ... in keeping with goals set in the Reconstruction and Development Programme.'³¹

While the GEAR document located the attainment of RDP objectives within the GEAR programme, commentators consider its primary purpose of opening up the South African economy to neo liberal policies of the international financial institutions at variance with RDP objectives.³² It was also felt that the RDP had proved incapable of meeting the high expectations it had generated.³³

While the RDP was created with the participation of the nonprofit sector, represented mainly by development NGOs, trade unions and civil society organisations, GEAR did not. Rather, GEAR emerged from the deliberation of a macroeconomic team, with the focus on creating a 'competitive outward-oriented economy' in line with developments in the international finance field.³⁴ With GEAR, economic growth would be guided by fiscal discipline and a

³¹ 'Growth, Employment and Redistribution: A Macroeconomic Strategy' (South African Government Document, 1996) article 1.1, accessed at www.gov.za/reports/1996/macroeco.htm on 19/3/2004.

³² See A. Nowicki, 'What Went Wrong in the 'New South Africa?' (October 22, 2003), accessed at www.zmag.org/content/showarticle.cfm?SectionID=2&ItemID=4378 on 19/3/2004 at 2-3. See also, Dangor et al, op. cit. at 16.

³³ Greenstein et al, op. cit. at 26.

³⁴ GEAR document, article 1.3. See also 'Acknowledgments' section in GEAR document for list of contributors, who were mainly economists.

reduction of government's role in the economy. The two programmes have been described as representative of government's attempt to balance the imperatives of sustainable internal growth with the external constraints of trade liberalisation as South Africa entered the world economy after decades of isolation imposed by apartheid.³⁵

GEAR was seen to be in line with the World Bank strategy for South Africa which was based on private-sector, export-led growth, which entailed reducing government expenditure and deficits, reducing inflation, decreasing government role in the economy, privatising public enterprises, lowering tariffs to open up to international competition, ending exchange controls, and reducing wages to increase competitiveness.³⁶

GEAR was not without its effects on the nonprofit sector, as government's pre-occupation with macro-economic policy, soon left the task of poverty and inequality reduction to the nonprofit sector.³⁷ This imposed on the sector the role of 'piecemeal providers of social services' which, it was feared by some, had the potential of detracting from their distinctive role as agents and catalysts of social transformation.³⁸ Still, it must be pointed out that even with the RDP, it was foreseen that the new government would have limited capacity to deliver services to the poor, and consequently the RDP government urged civil society organisations 'to develop RDP programmes for action and campaigns within their own sectors and communities.'³⁹

The shift of responsibility for social services to the private sector meant a reduction in government's involvement in direct social service delivery. As government contracted out social services, an increasingly competitive service

³⁵ Dangor et al, op. cit. at 6.

³⁶ See J. Hanlon, 'How Should South African NGOs Deal with the World Bank?' - A briefing paper prepared for the South African National NGO Coalition (SANGOCO) (Johannesburg: SANGOCO Publications, 1998) pp.7-8.

³⁷ Dangor, (1999a), op. cit. at 3.

³⁸ Marais, op. cit. at 99-100.

³⁹ ANC: *Reconstruction and Development Programme – A Policy Framework*, (Cape Town, 1994), cited in Greenstein et al, p.26.

delivery market developed - one in which businesses and nonprofit organisations participated. It is believed that in this environment, the general perception of businesses as being more experienced and efficient in delivery attracted government funds to the commercial sector, to the financial disadvantage of nonprofit service delivery organisations.⁴⁰ Nonprofit organisations were thus increasingly pressured by the fast track delivery approach which seemed more efficient than the people-led delivery which typically operates as a gradual, arduous process, often perceived as uncertain and sluggish.⁴¹

While the internal pressure resulting from the implementation of GEAR described above mounted, further strain came on the sector from external sources, by way of drastic reductions experienced by many nonprofit organisations in the wake of the formal end to apartheid, signified by the 1994 elections. The RDP agenda of governance was seen as a more comprehensive way of addressing the urgent tasks of development facing the new democracy, and thus deserving of more attention from international funders.⁴² As it turned out, the high dependence on external funding bred during the apartheid years was such that this redirection of funds from anti-apartheid nonprofit organisations to the post-apartheid government in normal bilateral aid pattern resulted in major shortfalls of millions of dollars in funding received by many nonprofit organisations in 1995-6, a trend which affected civic advocacy organisations as well as service delivery organisations.⁴³

While the reality of external funding cuts to various nonprofit organisations was not disputed, it has been argued that funding shifts and re-prioritisation by funding agencies may have resulted in the loss of funding by some nonprofit organisations, but not necessarily in the reduction of funding to

⁴⁰ Dangor (1999a), op. cit. at 4-5.

⁴¹ Marais, loc. cit.

⁴² Greenstein et al, op. cit. at 36.

⁴³ Dangor et al, op. cit. at 24.

the sector. For instance, where, in a particular year, a funder decided to cut down on administrative costs, the decision may have been taken to reduce the number of organisations to be funded while increasing the contracts of those funded from annual to multi-yearly.⁴⁴

Indeed, funding shortfalls also account for increased 'patronage' of government contracts by nonprofit organisations. The sector has therefore had to engage with the demand for professionalism, while remaining alive to the values of participation and empowerment which have been the strength of the nonprofit development organisation.⁴⁵

It was at this time also that coalitions of civil society and other nonprofit organisations emerged. The first and largest of these was the South African National NGO Coalition which was established in 1995 to co-ordinate the input of nongovernmental organisations (NGOs) into the emerging policies of government, and to sustain the gains achieved by NGOs in the anti-apartheid struggle.⁴⁶ SANGOCO has served as an umbrella body for NGOs in taking up concerns that cut across the work of various organisations in the nonprofit sector. Accordingly, its programmes include the 'people's budget' project, the global campaign for education, social security and the basic income grant projects.⁴⁷ The Coalition has also led initiatives to define broad terms of engagement for the NGO community with multilateral financial institutions.⁴⁸ Altogether, the post-apartheid scenario was captured in the following statement:

'Civil society organisations have begun to adopt new roles as participants in the policy-making process, partners in service delivery, and monitors of the new government's performance. This has implied a shift in orientation, as the skills, structures and modes of interaction involved in political resistance on the one hand, and reconstruction and development on the other, differ sharply. A need has been felt to focus on technical expertise instead of mass mobilization, long-term strategies

⁴⁴ Kraak, op. cit. at 129.

⁴⁵ Dangor (1999a), op. cit. at 1-5.

⁴⁶ See www.sangoco.org.za, accessed on 8/8/2005.

⁴⁷ <http://www.sangoco.org.za/index.php?option=content&task=view&id=47&Itemid=47>

⁴⁸ Hanlon, loc. cit.

*instead of spontaneous actions, administrative capacity instead of resistance creativity, and positive policy input instead of negative critique.'*⁴⁹

Thus government economic policy moved from the social objectives of the RDP, described as 'relatively expansionist', to GEAR with its emphasis on financial stability, and has since alighted on a 'a series of commitments which go well beyond service delivery to the poor to involve, among other issues, international relations, economic policy and security issues.'⁵⁰ This blend of commitments reflects the advent of South Africa as a power within the continent.⁵¹ The contemporary nonprofit sector in South Africa which has emerged from the above process is described in the next section.

4.3 The Character of the Nonprofit Sector in Contemporary South Africa

It may not be appropriate to generalise on the character of various organisations in the nonprofit sector for the main reason that they are as diverse as human activity and need. It is however considered useful to describe the relationship between government and the nonprofit sector as this conveys a picture of the character of the sector that crystallised from the transition process. This is followed by a description of the size and scope of the sector in South Africa. This section is intended as a necessary precursor to examining the role of law in the development of the sector.

4.3.1 Government Relations with the Nonprofit Sector

As the foregoing demonstrates, a key issue for the non profit sector post apartheid was the dynamics of relating with government. This was because the sector was largely part and parcel of the anti-apartheid movement which gave birth to the new government. However, while formal struggle ended with the

⁴⁹ Greenstein et al, at 30.

⁵⁰ D. Hemson and M. O'Donovan 'Putting Numbers to the Scorecard: Presidential Targets and the State of Delivery' in S. Buhlungu, J. Daniel, R. Southall and J. Lutchman (Eds.), *State of the Nation: South Africa 2005-2006* (Cape Town: Human Sciences Research Council, 2006) p.12.

⁵¹ Ibid.

1994 elections for those who found themselves in government, associations of civil society remained and had to reconstruct their purpose, mission and agenda within the new socio-political dispensation.

It appeared that in sharing the overarching goal of defeating the apartheid regime, civil society organisations did not spend enough time discussing their own future and what their relations to the future democratic South African state might be, and thus seemed unprepared for subsequent developments.⁵²

Not all post apartheid concerns of the nonprofit sector were unexpected. In the dying years of apartheid, there had been projections that civil society activity would outlive apartheid and that the apartheid state and civil society would have to learn to live in 'creative tension' with one another. The issue therefore, was not whether, but "what strategies, including legislation, would be required to aid this process?"⁵³

In the post-apartheid environment, it became clear that the civil society sector would have to develop skills in balancing its new roles with pre-existing responsibilities on three fronts at least. First, in relating with government, it would have to find a way between the market focus of the business sector and the welfarist 'hand of the state' focus of the labour movement – a way which would combine elements of both approaches while avoiding their pitfalls.⁵⁴ Secondly, in partnering with government in service delivery, nonprofit organisations had to learn to cross-subsidise capacity building work with revenue generated from government contracts – a task which requiring new competencies.⁵⁵ A third skill would be to gain a more accurate understanding of the local and international funding environments.⁵⁶

⁵² Ibid. at 38.

⁵³ S. Walters, 'Non-Governmental Organisations and the South African State: Present and Future Relations' (Cape Town: University of the Western Cape, Centre for Adult and Continuing Education, working paper, 1990) pp. 9-10.

⁵⁴ Greenstein et al, op. cit. at 57.

⁵⁵ Marais, op. cit. at 119.

⁵⁶ Kraak, op. cit. at 139.

The ongoing adjustment of nonprofit organisations to the dynamic post-apartheid environment is only one side of the coin in government-nonprofit sector relations. The other side is the government itself, represented through its state-civil society ideology and its structural framework for this engagement. To a large extent, state - civil society relations are influenced by the type of government existing within a particular country at any point in time. While associations of civil society are usually perceived as opposition forces in countries with dictatorships, a measure of acceptance usually exists for welfare-oriented nonprofit organisations in single party states while varying degrees of acceptance exist in multi-party states, depending on the mission of particular organisations.⁵⁷

These state attitudes are in turn, informed by government's perception of its role in development. Walters argues that government in single party states usually believe they are the authentic voice of the people, state and civil society rolled into one, while more liberal states usually expect nongovernmental organisations to work within development frameworks constructed by the state, based on the view that promoting development and policy making are the exclusive responsibility of the state.⁵⁸ This attitude was somewhat reflected in the ANC call to civil society organisations to develop RDP programmes of action and campaigns within their own sectors and communities.⁵⁹ 'Generally, the experience is that most NGOs are seen as a threat to those running the state - they are seen as occupying political space which was not captured by the state or its agents.'⁶⁰

In the case of South Africa, the question was: 'how does a new democratic state relate to a civil society that emerged in the course of a struggle for democracy, and shared the goal of bringing democracy about, but continues to

⁵⁷ Walters, op. cit. at 6-7.

⁵⁸ Ibid. at 6.

⁵⁹ ANC: *Reconstruction and Development Programme - A Policy Framework*, (Cape Town, 1994), cited in Greenstein et al, p.26.

⁶⁰ Walters, op. cit. at 6.

exist independently of the new political structures?’⁶¹ Government attitude towards the nonprofit sector was perceived in some quarters, as initially dismissive, since the cardinal objective of securing democracy had been accomplished.⁶² The explanation given for this was that the fear of not being able to exercise sufficient control over the state led the ANC government, to extend its traditionally centralist approach into governance.⁶³ Nevertheless, the presence of former civil society activists and nonprofit sector leaders within the new government structures did serve to promote a strong role for civil society in public policy making.⁶⁴ The ambivalent attitude of government however changed to appreciation as the advocacy and service delivery work of different kinds of nonprofit organisations served to justify the continuing relevance of the nonprofit sector as partners with government in development and democracy-building.⁶⁵

The value which non-profit organisations bring to development processes was demonstrated by the findings of a study which evaluated the work of a service delivery nonprofit organisation and a civic-advocacy organisation.⁶⁶ It was found that the diversionary programme for young offenders run by the National Institute for Crime Prevention and Reintegration of Offenders, a nonprofit organisation was more cost-effective than merely remanding them in prison, because it yielded reduced rates of re-offending among the youth, and cost less to run per participant than it cost to maintain each offender in prison.⁶⁷

Similarly, the Provincial Parliamentary Programme (PPP), a non-profit initiative in the Kwa Zulu Natal Province, during the period covered by the

⁶¹ Greenstein et al, op. cit. at 4.

⁶² Dangor et al, op. cit. at 31.

⁶³ Greenstein et al, op. cit. at 37.

⁶⁴ Ibid.

⁶⁵ Dangor, op. cit. at 31.

⁶⁶ S. Motala and D. Husy, 'NGOs Do it Better: An Efficiency Analysis of NGOs in Development Delivery' in *The Learning Curve: A Review of Government and Voluntary Sector Development Delivery from 1994*, (Development Update Vol.3 No.4, 2001) p.71.

⁶⁷ Ibid. at 91-3. Government savings per one thousand offenders participating in the programme was calculated at over R4 million.

study, intercepted several problem bills, which might have triggered off challenging litigation if passed. An example was the Children's Commissioner Bill which was campaigned against by the PPP, and was eventually rejected by the Kwa-Zulu Natal legislature. Passing the bill, apart from generating expensive litigation, would have led to the creation of a Commissioner's unit, a development which would have duplicated existing offices and brought more expense on an already poor province.⁶⁸ Nevertheless, as Greenstein observes:

*'We cannot look up to civil society as a magic solution to all social problems. Rather we must examine it critically, and evaluate the best ways in which elements within it can form alliances with elements within the state (and potentially the market as well) to advance the cause of development. Our goal then is not to set one sector against the other, but to find a way to integrate their efforts to maximize the benefits for all.'*⁶⁹

The usefulness of strategic partnerships between government and civil society organisations is acknowledged by leading nonprofit sector practitioners.⁷⁰ It must be noted that civil society was not the only interest bloc seeking to influence government at the time. External actors such as the World Bank were, at this time also trying to influence government policy, and in that 'bank-government-civil society triangle', civil society was often perceived as a 'junior partner' dependent on the good will of government and the Bank.⁷¹ In the next section, the structure of contemporary nonprofit sector in South Africa will be described, using the results of previous large scale research on the sector.

4.3.2 Descriptive Features of the Non-Profit Sector in South Africa

Studies of the nonprofit sector in South Africa, as in most other African countries, have been at micro levels, or at best medium levels. Usually, small

⁶⁸ Ibid. at 92 and 104.

⁶⁹ Greenstein et al, op. cit. at 11.

⁷⁰ See also Saldanha, op. cit. at 214.

⁷¹ Hanlon, op. cit. at 14.

samples are used for reasons of manageability, limited funding or low response rates from respondents. For instance in a 1996 study, the scale of a research project on nonprofit organisations conducted by the Development Resource Centre (DRC) was reduced as a result of a ten per cent response rate. Questionnaires were distributed to one thousand agencies, but only one hundred and eight responded.⁷²

Of the one hundred and eight organisations who responded to the DRC survey, 37% were small organisations, 23% were medium while 40% were large. Small organisations were defined as those employing between one and nine staff members, excluding volunteers, medium organisations were those with ten to nineteen staff members, while large organisations employed twenty or more staff.⁷³ The average number of staff per organisation was fifteen. While the most frequently mentioned primary stated mission was community development, the most mentioned primary activity was education, including children, youth and adult education.⁷⁴ In this research, nonprofit organisations had been classified according to the period of their establishment. In this regard, three categories were identified, namely, venerable or long-established, emergency and transition.⁷⁵

The venerable agencies were those founded between 1900 and 1985, emergency organisations were those founded between 1986 and 1990, while the transition organisations were those founded between 1991 and 1995.⁷⁶ Many of the venerable organisations were traditional welfare organisations, providing social services to the white population.⁷⁷ The emergency organisations, so called because they were established during the state of emergency declared by the apartheid government, were typically, organisations directly involved in the

⁷² Dangor et al, op. cit. at 18.

⁷³ Ibid. at 19.

⁷⁴ Ibid.

⁷⁵ Dangor et al (1999b), op. cit. at 20.

⁷⁶ Ibid. at 20-21.

⁷⁷ See Marais, op. cit. at 107. This category also fits into the welfarist nonprofit organisation type identified by Greenstein et al at 35.

apartheid struggle. The transition organisations were mainly focused on policy work aimed at strengthening democracy and facilitating development.⁷⁸

Of the 108 organisations involved in the 1996 research, 45 percent were venerable organisations, 27 percent were emergency organisations, while 28 percent were transition organisations.⁷⁹ All surviving venerable, emergency and transition organisations have had to adjust to the new socio-political terrain.

A larger, weighted and more detailed study, carried out in the late 1990s through a collaboration between three research institutions, reported an estimated 98,920 non-profit organisations in South Africa, 53 per cent of which were less formalised, community-based organisations.⁸⁰ The total operating expenditures of the South Africa nonprofit sector in 1998 was put at R9.3 million, representing 1.2 per cent of the gross domestic product.⁸¹ The sector employed the equivalent of 645,316 full time workers, made up of full time, part-time and volunteer workers, a figure representing 9 per cent of the formal non-agricultural workforce and 7.6 per cent of the total non-agricultural workforce.⁸² Volunteer labour, estimated at nearly 1.5 million, was calculated to be the equivalent of 316,991 full-time jobs and accounted for 49 per cent of the workforce in the nonprofit sector, representing a significant amount of unpaid labour.⁸³

The study identified eleven sub-sectors of the non-profit sector. These were culture and recreation, education and research, health, social services, environment, development and housing, advocacy and politics, philanthropic intermediaries and voluntarism promotion, international, religion, business and professional associations and unions.⁸⁴ These sub-sectors were further subdivided. A tabular representation of some basic findings of that research is shown in Appendix H.

⁷⁸ Dangor, loc. cit.

⁷⁹ Ibid.

⁸⁰ Swilling and Russell, op. cit. at 20.

⁸¹ Ibid. at 15.

⁸² Ibid. at 16.

⁸³ Ibid. at 17 and 18.

⁸⁴ Ibid. at 27.

The research also developed a classification of nonprofit organisations by legal status, based on the mode by which it was established. Categories identified were informal or voluntary associations, section 21 company, religious organisation, union, stokvel or burial society, trust or foundation, political party, co-operative, and other.⁸⁵

In subsequent sections of this chapter, the current legal framework for the work of the contemporary nonprofit sector in South Africa will be examined. In particular, recent statutory interventions which have a direct bearing on the operation of nonprofit organisations are highlighted.

4.4 The Legal Environment for the Nonprofit Sector in South Africa

The law influences the operating environment of the nonprofit sector in many different ways, as seen in chapter two. One way in which it does this is by providing for the organisation and leadership of people, as well as for the allocation of resources for nonprofit activity.⁸⁶ The complexity which the whole body of law on a particular subject, when pieced together, can have on an issue has led to the observation that caution is required in studying and promoting the role of law in the development of social processes such as are found in the nonprofit sector. This is especially so, where other factors, such as political, economic or cultural considerations may counter the direct effects of law.⁸⁷ Other areas in which legal regulation has been suggested as desirable for the work of nonprofit organisations are in respect of quality of work and right of redress by clients, reflected in clear formal channels for complaint and control.⁸⁸ Although these areas are not within the scope of this work, they nevertheless

⁸⁵ Ibid. at 21.

⁸⁶ Marais, op. cit.

⁸⁷ See Salamon and Toepler, op. cit. at 2.

⁸⁸ D. Harding, *From Global to Local: Issues and Challenges Facing NGOs* (Durban: Olive Information Service, AVOCADO Series, 1994) p.22.

remain pertinent issues in the topical subject of accountability and regulation of the nonprofit sector.

As earlier mentioned, three key points at which nonprofit organisations interact with formal mechanisms of the law are identified.⁸⁹ These are the establishment of legal personality, the provisions of tax law and the law relating to people's freedom to form associations. Provisions that confer legal personality on a nonprofit organisation generally have the capacity to protect officers and members from personal legal liability for the organisation's actions. Tax law provisions have the potential to encourage or discourage philanthropic contributions to nonprofit agencies and the general posture of the law towards associational activity will impact on people's inclination to associate.⁹⁰ A fourth compelling point which is identified in this work is in respect of human resources employed in nonprofit organisations, and the dynamics of employment relations and law created by this.

In subsequent sections of this chapter, these legal intersections with the nonprofit sector in South Africa are examined from three perspectives, namely, permissible purposes of association, legal and tax framework and employment law. In studying this subject, the focus will be, not on specific provisions of the law, but on the ways in which selected statutes shape construct the operating environment for the work of nonprofit organisations.

4.5 Permissible Purposes of Association

The freedom of association has been described as correlative in the sense that it makes good the promise of a variety of other rights.⁹¹ The importance of the provisions of the law on the freedom of association is further predicated on the

⁸⁹ See the definition of 'legal environment' in 1.5 supra.

⁹⁰ Salamon and Toepler, *op cit.* at 1.

⁹¹ I. Currie and J. de Waal, *The Bill of Rights Handbook* (5th Ed., Lansdowne: Juta, 2005) p.420.

fact that, in addition to multi-party election, other avenues of expression of the popular will are essential for substantive democracy to take root.⁹²

A number of distinct laws directly and indirectly affected the associational activities of organisations within the nonprofit sector during the apartheid era in South Africa. For example, some laws restricted movement, others specified different residential locations for different population groups while others were used to invoke state apparatus to checkmate mobilisation activities perceived to be in opposition to the apartheid government.⁹³ Perhaps the most blatant form of the use of law in the curtailment of the freedom of association occurred at the industrial level. Labour relations during the apartheid years were extensively manipulated by law.

Accounts of the history of South African labour relations have shown the systematic way in which dual labour relations along racial lines were formalised with the Industrial Conciliation Act 1924 (ICA) which omitted pass-bearing black people from the definition of 'employee'.⁹⁴ This meant that trade unions formed by black workers were unregistered and so excluded from industrial councils.⁹⁵ The ICA was further used to entrench this system when in 1956, it was amended to prohibit the formation of mixed trade unions – a trend which the common needs of the different racial unions had fostered.⁹⁶

The illegal status of black trade unions did not stop them from forming, and the 1973 strikes by black workers in the Durban area 'heralded the beginning of the end for the racially exclusive system'.⁹⁷ The 1973 strikes emphasized the dangers in non formal representation of black workers, especially since employers were increasingly bypassing statutorily established labour councils

⁹² Greenstein et al, op. cit. at 11.

⁹³ Marais cites some of these restrictive laws as the Group Areas Act, the Movement of Black Persons Act, the Fundraising Act, the Internal Security Act and the State of Emergency Act.

⁹⁴ Finnemore, op. cit. at 31.

⁹⁵ D. du Toit et al, *The Labour Relations Act of 1995* (2nd Ed. Durban: Butterworths, 1996) p.9.

⁹⁶ Finnemore, loc. cit..

⁹⁷ Du Toit et al, loc. cit.

and negotiating directly with these unions.⁹⁸ The industrial pressures of the early seventies coupled with international pressure of the mid-1970s, following the Soweto uprisings, eventually led to the setting up of the Commission of Inquiry into Labour Legislation, otherwise known as the Wiehahn Commission (WC) to study and make recommendations for labour relations in South Africa.⁹⁹

The Commission submitted its recommendations in 1979, which among other things prescribed freedom of association to all workers, irrespective of race and status as migrants or commuters. The report also recommended autonomy of unions in deciding membership criteria.¹⁰⁰ Although the Commission is widely hailed as having introduced the measures that opened up the workplace space for black trade unions, it is believed in some quarters that the covert aim was to bring them under tighter controls, already exercised over other registered racial trade unions.¹⁰¹ Findings in this regard attributed to the Commission include the following:

*'Black Trade Unions are under no statutory control as far as management, annual reports, meetings, constitutions and political participation are concerned. They presently enjoy the largest degree of unlimited freedom, can unite with other unions through affiliation without government approval and thus embrace strategic industries which can be paralysed by strikes at any given moment. The situation has now been reached where some Black Trade Union leaders prefer non-recognition of their organisation by state.'*¹⁰²

Nevertheless, the government resisted the full implementation of the recommendations of the Wiehahn Report until 1981 when the ICA was amended to provide for full trade union rights to every worker. The amendment also provided for full autonomy in respect of trade union membership and the

⁹⁸ Finnemore, op. cit. at 35.

⁹⁹ Du Toit et al, op. cit. at 9.

¹⁰⁰ 'Report of the Commission of Inquiry into Labour Legislation' (RP 47/1979), cited in Du Toit et al, loc. cit.

¹⁰¹ See unreferenced South Africa country report accessed at <http://countrystudies.us/south-africa/79.htm> on 20/1/2006.

¹⁰² Unreferenced news report on the Wiehahn Commission, accessed at <http://disa.nu.ac.za/articledisplaypage.asp?filename=SeAug79&articletitle=The+Wiehahn+Commission> on 20/1/2006.

removal of racial restrictions. The amendment repealed the Black Labour Relations Regulation Act and renamed the Industrial Conciliation Act, Labour Relations Act 1981.¹⁰³ Thus, the overlap of workplace and political struggle characterised industrial relations through the 1970s, led first to the attainment of industrial citizenship by black workers in the early 1980s even while they lacked political citizenship.¹⁰⁴

In the context of the history recounted above, the 1996 Constitution of the Republic of South Africa provides an unqualified right to freedom of association.¹⁰⁵ This provision is further reinforced at the workplace by the Labour Relations Act 1995 which provides for freedom of association at the workplace and the right to fair labour practices, encompassing the right to form and to join a trade union.¹⁰⁶

The right to freedom of association in the workplace is protected from incursion such as the breach of the provisions of the union's constitution by trade unions as much as by employers. In *Theron & others v FAWU & others*¹⁰⁷, Mlambo J, maintained that 'the protection against infringement of the right operates against anyone who might infringe it. It is simply inconceivable that an employee could enjoy protection of this freedom of association right against his employer, but does not enjoy the same protection against the infringement of the same right by his own trade union.'¹⁰⁸ In this case however, the removal of the three applicants from their position in the national executive of the trade union was not shown to have been done in violation of the union's constitution.

Related to the freedom of association are the respective rights to freedom of expression and freedom of religion, belief and opinion.¹⁰⁹ The latter right is one which facilitates nonprofit activities which may be carried out by religious

¹⁰³ Finnemore, op. cit. at 36-7.

¹⁰⁴ Ibid. See also Du Toit et al, op. cit. at 9.

¹⁰⁵ S. 18.

¹⁰⁶ LRA, ss. 4 and 23(1) and (2).

¹⁰⁷ [1998] 5 BLLR 528 (LC).

¹⁰⁸ *supra* at 530.

¹⁰⁹ ss. 16(1) and 15(1).

organisations or individuals as part of religious observances. This provision also allows the use of state facilities for religious observances.¹¹⁰ Considering that a large percentage of nonprofit activity is carried on by religious organisations, it is submitted that this is an enabling provision for the nonprofit sector.

The wide ambit which the constitutional provisions give to the principle of association reflects the spirit in which law should govern the nonprofit sector, articulated in the following statement:

*'Nor should legislation curtail the activities of NPOs or constrain and hamper them on the assumption that they will violate the law. The law should operate punitively only after it has been broken or after the NPO has failed to account in accordance with the laid down procedures.'*¹¹¹

Indeed this observation is reinforced by the position taken by Mlambo J. in *Theron & others v FAWU & others*¹¹² that it could only interfere with the decision of a voluntary association if it departed from its own constitution.

The protection given by South African law to the right to freedom of association at the workplace draws from international conventions as much as from the historical experience. In *NUMSA & others v Bader Bop (Pty) Ltd & another*, the Constitutional Court reinforced the decisions of the Freedom of Association Committee of the ILO as an important jurisprudential resource for the development of labour rights in the South African Constitution.¹¹³

As much as the law promotes freedom of association, and by extension, the work of the nonprofit sector, it also works to protect the public interest where this is unfavourably affected by the operation of a nonprofit organisation. In *Pienaar v Thusano Foundation & Another*,¹¹⁴ it was held to be in the public interest to wind up the first respondent, a nonprofit agency incorporated under s.21 of the Companies Act 61 of 1973 as a company limited by guarantee. This was

¹¹⁰ s.15(2).

¹¹¹ Dangor et al, op. cit. at 30.

¹¹² *supra*.

¹¹³ [2003] 2 BLLR 103 (CC) at paras. 29-30.

¹¹⁴ 1992 (2) SA 552 (BG).

based on the finding that there was a convergence of factors, any of which was sufficient to ground a liquidation. These factors included the mismanagement of the company and loss of confidence, coupled with the lack of finance and the disappearance of the substratum of the company.

In that case, the first respondent was established to consolidate, administer and finance an existing vast, all-embracing project known as 'Drought Relief' which operated about seventy five depots in Bophuthatswana, distributing rations to approximately 12,500 families, providing water where required and rendering substantial service to families in need. The company was funded by the governments of Bophuthatswana and South Africa and staffed by state appointees and nominees. It essentially operated as a parastatal body controlled by the government of Bophuthatswana. A board of enquiry set up to investigate allegations of irregular activities submitted a report which indicted the second respondent for certain shortcomings in the financial management and administration of the agency.

Shortly after the submission of the report, the South African government discontinued its funding, and an application was brought to wind up the company in terms of s.344(h) of the Companies Act 1973. The grounds for the application for liquidation were the mismanagement of the company, lack of proper control, dissatisfaction with its management and specifically with the competence of the second respondent. A provisional liquidation order was granted, and following this, the government of Bophuthatswana terminated its funding of the agency and dismissed its workers. The second respondent opposed the provisional liquidation, but on a number of grounds, the second defendant's objection was overruled and the liquidation order was made final.

The court's decision was based on a number of grounds. First, the court ruled that it was inconceivable that the agency could discharge the vast and numerous projects to which it had committed itself without the injection of finance from its former sources. Secondly, the Court had to consider and balance

the justice and equity of the competing interests, on the one hand, of the second respondent who opposed the provisional liquidation order, and on the other hand, of the applicant for winding-up. The applicant was the Managing Director of a large State-controlled organisation, supported by the Minister of Finance and other functionaries, who were in favour of final liquidation for a variety of reasons, including the fact that the substratum of the company had disappeared.

Thirdly, considering the fact that the money invested in the company was, in the main, taxpayers' money, the Court could not countenance the continued waste or mismanagement of public funds, and this was an instance where the Court was entitled to broaden the ambit and extend the catalogue of cases where it was 'just and equitable' to wind up a company. Finally, in the case of a section 21 company formed for the purpose of conducting cultural or social or communal or group interests, if there was mismanagement and if its main object was no longer capable of achievement, it was a proper case where the Court might grant a final winding-up order to protect the public interest.¹¹⁵

From the foregoing, it may therefore be appropriate to conclude that the freedom of association provision also protects the freedom of persons not to establish an association, to stay out of existing associations, to dissolve an association and to resign from an association.¹¹⁶ The exercise of the freedom of association is however not upheld where overriding public interest makes it necessary for certain professionals to belong to a regulatory professional body in order to practice their profession.¹¹⁷

Having discussed some of the ways in which the law affects the exercise of the freedom of association, the discussion proceeds in the next section, to examine other legal provisions that apply generally to different kinds of

¹¹⁵ The term 'section 21 company' refers to a company formed under section 21(1) of the Companies Act 1973, which provides for the incorporation of 'associations not for gain' as companies limited by guarantee.

¹¹⁶ I. Currie and J. de Waal, *The New Constitutional and Administrative Law Vol. I Constitutional Law* (Lansdowne: Juta, 2001) p.378.

¹¹⁷ This was the decision in *Law Society of the Transvaal v Tloubatla* 1999 (11) BCLR 1275 (T) 1280A.

nonprofit organisations in South Africa. Although a nonprofit organisation can be created in a number of ways, mentioned briefly in the next section, the focus is on the legal provisions that apply to nonprofit organisations generally, irrespective of the mode of creation.

4.6 Registration and Tax Framework

The difficulties associated with the decline in funding to the sector discussed earlier led nonprofit organisations to explore other avenues of raising and saving funds in the immediate post-apartheid period.¹¹⁸ Lobbying for tax reforms to encourage philanthropic giving was initiated at this time also.¹¹⁹ Partnerships between the sector and government for purposes of creating a facilitating legal framework for nonprofit organisations were also pursued.¹²⁰ An independent study of the nonprofit sector commissioned in 1992 continued post-transition, focusing on the tax status of nonprofit organisations, incorporation and registration issues, fundraising, giving and fundamental rights crucial to a vibrant and effective civil society.¹²¹

The results of these efforts were the enactment of the Nonprofit Organisations Act 1997 and the amendment of the Income Tax Act 1962 and the Fundraising Act 1978 respectively. The provisions of the first two laws operate principally, but jointly with others, to create the legal and policy environment for nonprofit organisations in South Africa.

4.6.1 The Nonprofit Organisations Act 1997¹²²

The Nonprofit Organisations Act 1997 (NPO Act) is made up of thirty sections, divided into five chapters broadly headed: interpretation and objects of the Act,

¹¹⁸ See 4.2.3 *supra*.

¹¹⁹ Marais, *op. cit.* at 107.

¹²⁰ Dangor (1999b), *op. cit.* at 7-8.

¹²¹ *Ibid.* at 5.

¹²² Act No. 71 of 1997.

creation of an enabling environment, registration of nonprofit organisations, regulations and general provisions.

The Nonprofit Organisations Act defines 'nonprofit organisation' as 'a trust, company or other association of persons established for a public purpose; and the income of and property of which are not distributable to its members or office-bearers except as reasonable compensations for services rendered.'¹²³ Thus, the Act recognizes three ways of creating a nonprofit organisation. This could be by registration as a trust under the Trust Property Control Act 1988, by registration as a company limited by guarantee under section 21 of the Companies Act 1973 or by the formation of a voluntary association of persons in exercise of the constitutional freedom of association guaranteed by section 18 of the 1996 Constitution.¹²⁴

The use of the term 'nonprofit organisation' to describe formal associations of civil society in the Act was predicated on its depoliticised content. The term gained acceptance with policy makers and nonprofit sector practitioners in the wake of the unresolved complexities of distinguishing between different kinds of civil society organisations, most notably nongovernmental organisations (NGOs) and community based organisations (CBOs).¹²⁵

Registration under the NPO Act is voluntary, and an organisation is not precluded from operating on grounds of non registration under the Act. The Act establishes a directorate for nonprofit organisations, the functions of which are broadly defined and include supporting nonprofit organisations in the registration process and facilitating the development and implementation of multi-sectoral and multi disciplinary programmes.¹²⁶

¹²³ S.1(1).

¹²⁴ Specific provisions exist in labour law for the formation of workplace associations such as trade unions as mentioned in 4.5 *supra*.

¹²⁵ Swilling and Russell, *op. cit.* at 6.

¹²⁶ s.5.

The main effect of registration under the Act is that it confers the status of a body corporate on a nonprofit organisation.¹²⁷ While the Act specifically sets out the technical effects of registration, it does not provide specific benefits, but rather gives room for a future determination of benefits accruing to organisations registered under the Act.¹²⁸ The Act prescribes a simple registration procedure, consisting of the submission of an application form together with a constitution containing certain specified provisions and any other information required by the Director.¹²⁹ The Director has the discretion to register an applicant organisation or to require that certain other provisions be complied with, and an applicant has a right of appeal to the Arbitration Tribunal established under the Act against a negative decision by the Director.¹³⁰

Further, the NPO Act accorded to organisations registered in terms of sections 4, 5 or 6 of the Fundraising Act 1978 the status of registered organisations under the NPO Act, subject to their compliance with certain procedures. The Act also transferred to the Director of Nonprofit Organisations, the functions of the Director of Fundraising in relation to organisations 'transferring' their registration from the Fundraising Act to the Nonprofit Organisations Act.¹³¹

The Act provides for the annual submission of accounting records and narrative reports of the activities of a nonprofit organisation registered under it to the Director of Nonprofit Organisations.¹³²

Perhaps, because it is the product of an extensive consultative and partnering process between civil society practitioners and government agencies such as the Department of Welfare, the NPO Act does not seem to have attracted much critique from the former. As Marais observed, 'The shape of the

¹²⁷ s. 16.

¹²⁸ s. 11.

¹²⁹ Ss. 12 and 13(1).

¹³⁰ Ss 13(3) and 14(1) respectively.

¹³¹ S.34.

¹³² Ss.17 and 18.

[Nonprofit] Bill bears the imprint of successful lobbying and advocacy - and participation in its design - by the voluntary sector.'¹³³ However, the Act has been criticised by some nonprofit sector scholars as having been articulated with very little empirical, quantitative knowledge about the South African nonprofit sector.¹³⁴ This criticism comes from the authors of an extensive research into the size and scope of South Africa's nonprofit sector.

Further, although it may be argued that since registration under the NPO Act is voluntary, its provisions do not impose any additional burden on nonprofit organisations, on the contrary, findings from empirical research indicate that registration under the NPO Act has come to be regarded by funders as a primary indicator of credibility in dealing with nonprofit organisations.¹³⁵ Therefore, the need to become and remain 'NPO Act-compliant' is a pressure felt generally by nonprofit organisations, not only because of the need for favour from funders, but also because of the tax advantages that accrue with registration under the Act.¹³⁶ This tax framework for nonprofit organisations in South Africa is the focus of the next section of this chapter.

4.6.2 The Tax and Fundraising Laws

Previously, a nonprofit organisation could obtain tax exemption only if it could show that it was of an 'ecclesiastic, charitable or educational' nature and of a 'public character'.¹³⁷ Clearly, such a narrow description worked to exclude many organisations, and educational institutions for instance, were typically seen as only those which promote a definite course of study.¹³⁸ Even more discouraging to potential funders was the fact that there was minimal tax deductibility for donations to a restricted class of nonprofit organisations, specifically educational

¹³³ Marais, op. cit. at 94.

¹³⁴ Swilling and Russell, op. cit. at 5.

¹³⁵ See Appendix A, item (ii).

¹³⁶ Income Tax Act 1962 s.30.

¹³⁷ Income Tax Act s.10(1)(f) and (1)(fA), replaced by the new section 30(3).

¹³⁸ Dangor et al, op. cit. at 30.

funds, universities or colleges.¹³⁹ A further disincentive to charitable giving was created by the provision that attracted additional tax to donations exceeding a certain percentage of taxable income, five percent in the case of companies and two percent in any other case.¹⁴⁰

The amendment to the Income Tax Act introduced by the Taxation Laws Amendment Act No. 30 of 2000 authorises the Commissioner to approve for tax exemption, public benefit organisations which, among other things, are registered under the Nonprofit Organisations Act 1997.¹⁴¹ Following this amendment, which took effect from 15 July, 2001, the Income Tax Act now confers tax-exempt status to 'the receipts and accruals of any public benefit organisation which has been approved by the Commissioner in terms of s.30(3).'¹⁴²

Institutions which were exempt under these sections had until 31 December 2004 to apply for exemption under the new section 10(1)(cN). Since then, section 10(1)(cN), read with section 30 and the Ninth Schedule to the Income Tax Act set out those institutions which qualify for exemption. These qualifying institutions are referred to as 'public benefit organisations' (PBOs).¹⁴³ In turn, a public benefit organisation which succeeds in securing the Commissioner's approval for tax exemption is described as an 'approved public benefit organisation.'¹⁴⁴

In broad terms, the Act defines the term 'public benefit organisation' to include organisations of a public nature, which carry out public benefit activities within South Africa in a non-profit manner.¹⁴⁵ The term 'public benefit activity' is described by reference to an activity which the Minister's determines to be 'of a

¹³⁹ Ibid. at 31.

¹⁴⁰ Income Tax Act 1962 s.18(A).

¹⁴¹ Income Tax Act 1962 (as amended) s.30(3)(g); Taxation Laws Amendment Act No. 30, 2000 s.35. which introduced a new section 30 to the Income Tax Act.

¹⁴² S.10(1)(cN).

¹⁴³ K. Huxham and P. Haupt, *Notes on South African Income Tax* (24th Ed., Roggebaai: Hedron Tax Consulting and Publishing CC, 2005) p.437.

¹⁴⁴ Income Tax Act 1962 as amended, s.30(3).

¹⁴⁵ S.30(1).

philanthropic and benevolent nature, having regard to the needs, interests and well-being of the general public for the purposes of this section.’¹⁴⁶

While there is no specific definition of ‘public benefit activity’, the ninth schedule to the Act lists by categories, certain activities that qualify as public benefit activity as follows: welfare and humanitarian, health care, land and housing, education and development, religion, belief or philosophy, cultural; conservation, environment and animal welfare, research and consumer rights, sport, provision of funds, assets or other resources; and general.¹⁴⁷

It is important to note that ‘public benefit activity’ is also defined to include the process of providing funds to a public benefit organisation approved under the Act.¹⁴⁸ Funds provision as envisaged in this section, is not limited to organisations approved under the Act, but extends to associations carrying on one or more public benefit activities as well as certain bodies which apply at least seventy-five percent of their resources in furtherance of a public benefit activity.¹⁴⁹ It is submitted that this provision seems to be directed at bringing donor agencies such as foundations within the ambit of the Act.

The government control imposed on fundraising exercises by nonprofit organisations through the Fundraising Act of 1978 has been mentioned in earlier sections.¹⁵⁰ Under the Fundraising Act, organisations were required to obtain permission from the Director of Fundraising before engaging in any fundraising activity. Organisations favoured by fundraising approval by means of a fundraising number were also required to submit an annual report to the Director of Fundraising. These provisions, located in chapters 1 and 3 of the Fundraising Act, were repealed by the Nonprofit Organisations Act 1997 to the extent of their application to fund-raising organisations, branches of such

¹⁴⁶ Ss.30(1)(a) and (2)(a).

¹⁴⁷ Income Tax Act 1962, as amended, 9th Schedule, Part I.

¹⁴⁸ s.30(1)(b)(i).

¹⁴⁹ s. 30(b)(ii) and (iii).

¹⁵⁰ See 4.2.1 *supra*.

organisations and any other organisation contemplated in Chapter I of the Fundraising Act.¹⁵¹

It must be pointed out that an organisation is not exempt from tax merely because it is a nonprofit organisation, but must satisfy one of the specific provisions in section 10 in order to qualify for tax exemption.¹⁵² This position can be illustrated using the earlier case of *CIR v Witwatersrand Association of Racing Clubs*¹⁵³ where the Association held a charity race meeting for the benefit of certain charities. The Association collected the money at the meeting and then paid it over to the charities concerned. The Commissioner of Internal Revenue (CIR) sought to tax the Association on the amount, and in the case that ensued, the court held that the Commissioner was correct because when the amount was received by the Association, it was not bound to pay it over to the charities, but merely had a moral obligation to do so. The amount therefore fell into the Association's gross income, for tax purposes, having been received beneficially by it. This case also demonstrates the importance of ensuring that where it is the intention that the amount should accrue for the benefit of another person, beneficial receipt does not take place in the hands of the first party.¹⁵⁴

Further, bona fide donations to a public benefit organisation which do not exceed five percent of the taxable income of the taxpayer are tax deductible.¹⁵⁵ The list of public benefit activities approved by the Minister for tax deductibility as provided by s.18A is set out in Part II of the 9th Schedule.

There seems to be a dearth of published cases on the subject of tax status of nonprofit organisations, perhaps because the nonprofit character rarely accommodates litigation expenses, or because of the preference of nonprofit organisations for alternative dispute resolution procedures or perhaps because of

¹⁵¹ Nonprofit Organisations Act, s.33.

¹⁵² Huxham and Haupt, op. cit. at 52.

¹⁵³ (1960 AD), cited in Huxham and Haupt, loc. cit.

¹⁵⁴ Huxham and Haupt, op. cit. at 13.

¹⁵⁵ Income Tax Act 1962 s.18(A)(1)(b)(ii). See also Huxham and Haupt, pp.50-53; 437-441 for more detailed discussions on the tax framework for nonprofit organisations.

the requirement of the taxpayer's consent for publication of the tax case.¹⁵⁶ It is submitted however, that considering the relative 'newness' of the 2000 amendments to the Income Tax Law, many nonprofit organisations are still in the process of positioning themselves to utilise its provisions by first registering with the NPO Act, and then proceeding to apply for tax exemption.¹⁵⁷

The success in securing tax exemptions for a wider category of organisations is a demonstration of positive legal intervention in the operating environment of the nonprofit sector. This trend would no doubt be reinforced if its value in improving the delivery of nonprofit organisations can be shown. In this regard, the importance of establishing a framework for measuring the impact of tax exemptions on delivery by nonprofit organisations has been emphasised, starting with the setting up of a database on currently exempt organisations.¹⁵⁸

4.7 Employment Law in the Nonprofit Sector in South Africa

While the interaction of law with development processes may take the form of direct statutory intervention as with the Nonprofit Organisations Act 1997, often it is by way of a generally applicable law, couched in terms that cover broad groups of people. This is the case with regard to employment law as it applies to workers in the nonprofit sector in South Africa.

The new government, in overhauling the whole system of labour relations had to deal with what has been described as a fragmented legislative framework, an ineffective system for settling labour disputes, fragmented and ineffective bargaining systems, high levels of labour unrest, lack of workplace democracy, an economy in crisis, and a labour relations framework that was out of step with

¹⁵⁶ Huxham and Haupt, op. cit. at 8.

¹⁵⁷ See Appendix A, item (xi) which alludes to delays in processing applications for registration under the NPO Act, which is carried out by the Directorate for Nonprofit Organisations exclusively in Pretoria.

¹⁵⁸ Kraak, op. cit. at 142.

South Africa's international obligations.¹⁵⁹ The post apartheid period was therefore, a time of transformation of the legal framework for labour relations in South Africa to reflect constitutional provisions as well as international labour standards.¹⁶⁰

Deliberations with social partners led to the enactment of the Labour Relations Act, the Basic Conditions of Employment Act, Employment Equity Act and the Skills Development Act.¹⁶¹ The new labour statutes were criticised on a number of grounds, namely, that the regulation of the labour market created by the combined effect of the statutes interfered too drastically with market forces, and that new inequities, inefficiencies and tensions were created in the workplace by the implementation of their provisions.¹⁶² The need to balance equity with economic growth is a recurrent theme in ongoing critiques of the current labour law regime in South Africa.

4.7.1 Labour Relations Act 1995¹⁶³

One of the major effects of the Act is the creation of a single labour relations framework for all sectors, public and private - except for some specified establishments such as the National Defence Force, National Intelligence Services and the South African Secret Service.¹⁶⁴ In *Adonis v Western Cape Education Department and another*¹⁶⁵, it was held that the categories of employees excluded by section 2 of the Labour Relations Act is exclusive and that the Act 'therefore applies to all other sectors', including the education sector. The Labour Relations Act (LRA) however provides a separate collective bargaining machinery for the

¹⁵⁹ I. Patel, 'Developments in Public Sector Labour Relations in South Africa' in E. Kalula and L. Madhuku (Eds.), *Public Sector Labour Relations in Southern Africa: Developments and Trends* (Cape Town: Institute of Development and Labour Law, Friedrich Ebert Stiftung, 1997) p.180 at 182.

¹⁶⁰ See Labour Relations Act 1995, s.1.

¹⁶¹ *Ibid.* at 46.

¹⁶² *Ibid.*

¹⁶³ No. 66 of 1995.

¹⁶⁴ LRA, s.2.

¹⁶⁵ [1997] 8 BLLR 1005 (LC).

public service.¹⁶⁶ In respect of the excluded categories of workers, the Labour Appeal Court observed in *Member of the Executive Council for Transport: KwaZulu-Natal and others v Jele*¹⁶⁷ that the excluded employees may well be adequately provided for in another Act, and if that is so, they could not have any cause for complaint about unfair discrimination on the basis that they are excluded from the protection of the LRA.

The Labour Relations Act seeks to advance economic development, social justice, labour peace and the democratisation of the workplace.¹⁶⁸ For this purpose, the Act contains comprehensive provisions on employees' rights and obligations, collective bargaining, worker participation and dispute resolution.

The way in which the LRA replaced previous labour legislation in its scope of application was reinforced in *IMATU & others v Greater Johannesburg Metropolitan Council & others*¹⁶⁹ where the contention that municipal employees were excluded from the application of the LRA was discountenanced on the grounds that neither local government nor any specific categories of employment within it are specified in section 2 of the LRA as an excluded category. The fact that a category of employees is or was subject to special legislation in the past was held to be irrelevant. Since nonprofit organisations are not exempt from the provisions of the Act, it follows that they are covered by the Act and expected to comply with its provisions. Thus the Act applies as much to nonprofit sector employees as it does to workers employed in the business sector and in government.

Any person applying the LRA must interpret its provisions to give effect to its primary objects, in compliance with the Constitution and in compliance with the public international law obligations of South Africa. As legal authors have observed, the fact that the legislature has chosen to stipulate these requirements

¹⁶⁶ LRA, ss.35-37.

¹⁶⁷ [2004] 12 BLLR 1238 (LAC).

¹⁶⁸ LRA, s.1.

¹⁶⁹ [2000] 12 BLLR 1449 (LC).

expressly [in the LRA], not only places them beyond question, but has also brought greater clarity to the law by directing judges and arbitrators on the meaning to be given to each requirement.¹⁷⁰

In some respects however, it may be that certain benefits of the LRA are enjoyed less by workers in the nonprofit sector. For instance, in pursuance of its worker participation thrust, the LRA provides for the establishment of workplace forums in employment establishments that employ more than one hundred employees.¹⁷¹ A strict application of this provision would exclude the majority of organisations in the nonprofit sector as the average unit workforce for nonprofit organisations is much less than that. The figure was put at fifteen and thirty four respectively by two different studies.¹⁷²

It is important to note that the relevance of employment law to the nonprofit sector is beginning to get some mention, alongside the NPO Act, among scholars of the nonprofit sector. Reporting on the accountability status of certain nonprofit organisations, it was observed that systems were in place for effective management and financial accountability, 'reflected in audited financial statements, compliance with the Nonprofit Organisations Act of 1997 and the Labour Relations Act of 1995, and so on.'¹⁷³

4.7.2 Basic Conditions of Employment Act 1997¹⁷⁴

Another core labour statute which applies to the nonprofit sector is the Basic Conditions of Employment Act 1997 (BCEA). The BCEA was enacted to establish and enforce basic conditions of employment, as well as to regulate the variation of such conditions. The provisions of the Act are directed at protecting vulnerable categories of workers where collective bargaining mechanisms are

¹⁷⁰ Du Toit et al, *Labour Law Through the Cases* (Cape Town: Lexis Nexis/ Butterworths, 2005), pp. LRA-1-13.

¹⁷¹ Labour Relations Act 1995 s.80.

¹⁷² See Dangor et al, op.cit. at 19.

¹⁷³ Motala and Husy, op. cit. at 107.

¹⁷⁴ Act No. 75 of 1997.

absent. This was with the aim of giving effect to the constitutional right to fair labour practices as well as meeting international obligations imposed by membership of the International Labour Organisation.¹⁷⁵

The Act establishes an Employment Conditions Commission to advise the Minister on matters relating to basic conditions of employment and other matters arising from the application of the Act.¹⁷⁶ The Commission is also to advise on the effect of government policies on employment, and on trends in collective bargaining, especially where such trends might undermine the purpose of the Act.¹⁷⁷

The BCEA applies to all employees and employers except members of the National Defence Force, the National Intelligence Agency and the South African Secret Service, and to unpaid volunteers working for an organisation serving a charitable purpose.¹⁷⁸ Although section 5 of the BCEA gives the Act precedence over any agreement, whether entered into before or after the commencement of the Act, other provisions give validity to terms of employment provided by law or by a contract of employment that are more favourable to the employee than the basic condition of employment as provided in the Act.¹⁷⁹

In *UWCASU & others v University of the Western Cape*,¹⁸⁰ it was argued that the BCEA took precedence over a collective agreement that provided for retrenched workers to receive accumulated leave pay. The issue was whether the calculation of such leave pay included allowances and benefits. The clear purpose of section 5, it was held, is to ensure that employers and employees enjoy the protection of the BCEA, and that being so, it could not have been the intention of section 5 or 4 to deprive parties of rights or better rights they may have through collective bargaining or dispute resolution. Since the collective

¹⁷⁵ BCEA, s.2.

¹⁷⁶ S. 59(1).

¹⁷⁷ S. 59(2).

¹⁷⁸ S. 3.

¹⁷⁹ BCEA, s.4 (a) and (c).

¹⁸⁰ (2002) 5 BLLR 487 (LC).

agreement created a right that the employees did not previously have, it was distinguishable from agreements that disadvantage parties, and was therefore enforceable.¹⁸¹

4.7.3 Employment Equity Act 1998¹⁸²

Another key statute is the Employment Equity Act 1998 (EEA) which has as its purpose, the achievement of equity in the workplace by promoting equal opportunity and fair treatment in employment.¹⁸³ The Act also seeks to achieve this by implementing affirmative action measures in favour of previously disadvantaged designated groups of the South African population.¹⁸⁴ The Act establishes a Commission for Employment Equity to advise the Minister on its provisions.¹⁸⁵

The interpretation of the Act is to be done in compliance with the international law obligations of South Africa, specifically the International Labour Organisation Convention (No. 111) on discrimination in respect of employment and occupation.¹⁸⁶ As with the Labour Relations Act, certain categories of people are excluded from the provisions of the EEA. These are members of the National Defence Force, the National Intelligence Agency, or the South African Secret Service.¹⁸⁷

While Chapter II of the Act applies to all employees and employers, Chapter III applies only to employers and people from designated groups, except where the chapter provides otherwise.¹⁸⁸

¹⁸¹ at 492.

¹⁸² No. 55 of 1998.

¹⁸³ S.2(a).

¹⁸⁴ EEA s.2.

¹⁸⁵ EEA ss. 28 and 30.

¹⁸⁶ EEA s. 3(d), see also s.3 LRA.

¹⁸⁷ EEA s. 4(3).

¹⁸⁸ EEA s.4(1) and (2).

4.7.4 Skills Development Act 1998¹⁸⁹

The Skills Development Act 1998 (SDA) is aimed at creating a facilitating environment for developing the skills of the South African workforce by various means, including using the workplace as an active learning environment.¹⁹⁰ The Act establishes a National Skills Authority to advise the Minister on a national skills development policy and strategy, among other functions. The Act further confers on the Minister, power to establish Sector Education and Training Authorities, taking into consideration, among other factors, any consensus that there may be between organized labour, organized employers and relevant government departments as to the definition of any sector.¹⁹¹

It is submitted that under the provisions of the SDA, the nonprofit sector and particular sub-sectors under it qualify for the establishment of sector education and training authorities, but it seems that these provisions are yet to be appropriated by organisations in the nonprofit sector.

The provisions of the four employment statutes discussed above apply to all sectors of employment. This does not mean however that employment in all three sectors have equal outcomes. Differences which exist between sectors, which may account for differing conditions of employment. For instance the provision on the constitution of a workplace forum where by one hundred or more workers in an establishment clearly does not have the nonprofit sector in view as nonprofit organisations are not large unitary employers.¹⁹² It seems factory and plant workers are the primary focus of this provision. Consequently, nonprofit sector workers generally cannot benefit from this provision of the Labour Relations Act.

Generally, the main differences between public sector and private sector employment include higher growth of employment in the public sector and more

¹⁸⁹ No. 97 of 1998.

¹⁹⁰ SDA, s. 2(1).

¹⁹¹ SDA, ss. 4 and 9.

¹⁹² Labour Relations Act 1995, s. 80(1).

sophisticated collective bargaining mechanisms with higher pay in the private sector.¹⁹³ These private sector advantages are however not characteristic of employment in the nonprofit sector, and whatever the effect of these differences on the process and results of collective bargaining they do not immediately affect the statutory provisions of employment law.

Nevertheless, the current framework of South Africa employment law offers enhanced protection to staff of nonprofit organisations, particularly in those areas of nonprofit activity which are characterised by small-to-medium size service delivery agencies and civic advocacy groups.

4.8 Conclusion

This chapter has attempted to describe the nonprofit sector in South Africa from combination of historical and legal perspectives. Emerging from this discourse is the theme civil society is not caged by particular types of associations, but exists within and beyond them. Mention has been made of social movements emerging outside traditional CBO frameworks, signaling new centers of popular initiative which are not just beneficiaries of developmental activity, but are potential agents of social change.¹⁹⁴

Earlier on in the chapter, the point was made on how the post apartheid scenario in the nonprofit sector was characterized by 'funding shortfalls, high staff turnovers, internal disarray, more exacting performance requirements from donors, a restrictive legal framework and confusion about its role in development processes and ... transformation.'¹⁹⁵

The work also went further to show how the South African nonprofit sector has, through the SANGOCO initiative on poverty eradication, articulated a central theme to succeed the anti-apartheid cause as a rallying point for the

¹⁹³ E. Kalula and L. Madhuku, 'Emerging Trends in Public Sector Labour Relations in Southern Africa' in Kalula and Madhuku (Eds.), op. cit. at 4. See also L. Abrahams, 'The Public Sector and Democratic Transformation in Southern Africa: Contemporary Experience' in Kalula and Madhuku (Eds.), op. cit. at 9.

¹⁹⁴ Marais, op. cit. at 124-5.

¹⁹⁵ Ibid. at 92.

activities of the sector. Through an extensive consultative process, a legal framework for the work of organisations in the sector has been enacted into law and tax benefits for a larger category of organisations have been introduced.

On the whole, and particularly through the engagement of organised labour with the apartheid South African state, the interplay between civil society and law is demonstrated. First, it was shown how segregational laws at the workplace intensified resistance in labour unions, which are generally recognized as one of the most organized and structured elements of civil society.¹⁹⁶ Next was how civil society reaction arrested a perpetuation of discriminatory law and, and yielded, first industrial citizenship, and eventually political citizenship to the black population.

Out of this political citizenship emerged an employment law framework aimed at creating a level playing field across sectors, including the nonprofit sector, in which the bulk of civil society activity is located. Thus repressive or negative law provoked civil society reaction that produced progressive or positive law, by which civil society itself is governed.

The chapter went on to describe the contemporary nonprofit sector in South Africa, showing how government-nonprofit sector relations have undergone a shift. This was followed by an examination of the legal framework for the establishment of nonprofit organisation in South Africa. In this regard, constitutional and statutory provisions relating to the registration and tax status of nonprofit organisations were examined. This was followed by a study of employment law provisions in relation to the nonprofit sector.

In the next chapter, a comparative analysis is made between the nonprofit sector in South Africa and that in Nigeria, highlighting similarities and

¹⁹⁶ V. Ntandayarwo, 'The Role of Trade Unions in Poverty Alleviation: Priority Agenda for the 21st Century' in (M. Mwamadzingo & D. Saleshando Eds.), *Trade Unions and Poverty Alleviation in Africa* (Geneva: International Labour Office Bureau for Workers' Activities, 2003) p.33.

differences in the growth factors and legal environment for the sector in the two countries.

CHAPTER FIVE

Comparative Analysis of the Role of Law in the Development of the Nonprofit Sector in Nigeria and South Africa

5.1 Introduction

The ways in which the modern nonprofit sector has emerged and taken shape in Nigeria and South Africa have been discussed in some detail in chapters three and four. Chapter four was dedicated to examining the nonprofit sector in South Africa with a view to defining its character, identifying the role of law in shaping its structure, and describing the growth of the modern nonprofit sector through the three major periods of apartheid, transition and post apartheid. It also identified and treated three areas of intersection with the law, namely, associational rights, registration and tax framework, and employment regulation. This chapter commences with a comparative analysis of the processes that led to the growth of the contemporary nonprofit sector in South Africa and Nigeria, with a view to determining how much of the experience is shared and identifying what factors account for the distinctions and divergences that appear. This is followed by a comparison of the legal framework governing the setting up and operation of nonprofit organisations in the two countries, leading to an identification of trends.

5.2 The Development of the Modern Nonprofit Sector in South Africa and Nigeria

In this section, the factors largely responsible for the emergence of the modern nonprofit sector in the two countries are concisely recounted. Thereafter, similarities and differences between the experiences of the two countries in relation to the growth of the sector are discussed.

5.2.1 South African Civil Society

Two distinct phases of contemporary civil society in South Africa, coinciding with key moments in the evolution of the political system, are identified. First was the liberalisation phase of the early 1980s which saw phenomenal growth in associational life and a marked resurfacing of black civil society actors. This was followed by the democratisation phase covering the period from 1994 onwards.¹ The liberalisation of political and economic controls in South Africa in the 1980s and early 1990s resulted in the emergence and growth of large numbers of civil society organisations critical of government, leading to a nonprofit sector described as 'politically centred' and 'artificially large'.²

The 'mushrooming of development forums' in the years leading up to the 1994 elections, has also been ascribed to the need to better equip local interest groups, represented by community-based organisations (CBOs), to compete in a globalised context. This called for multiple interest forums and frameworks to co-ordinate and drive socio-economic strategies.³ All said, the cell-like multiplication of civil society organisations was perceived in some quarters as a positive build up to the democratic elections, on the rationale that the proliferation of CBOs that impact on a particular institution advances ownership of that institution by ordinary people, and thus, their capacity to transform it.⁴

Prior to the liberalisation period of the early 80s, major political contest within civil society was between pro-apartheid and liberal pro-business organisations. This was a result of the sidelining of groups publicly opposed to apartheid at the time.⁵ Further, service organisations of the late 1970s, following the 1976 rebellion, and the ensuing international outcry, developed a resistance

¹ Habib, op. cit. at 230.

² T. Smith, 'Questioning the Crisis: International Donors and the Reconfiguration of the South African NGO Sector' (Durban, Olive Publications, AVOCADO Working Paper Series No.4/2001) Vol. 2/1-21.pp.7 and 11.

³ E. Pieterse, Edgar Pieterse, 'Local Activism in a Global Era, Emerging Debates for CBOs and NGOs' (Durban: Olive Organisation Development and Training, AVOCADO Series 04/1995) p.19.

⁴ A. Kaplan, 'NGOs, Civil Society and Capacity Building: Towards the Development of Strategy' (Durban: Olive Organisation Development and Training, AVOCADO Series, 1994) p.9.

⁵ Habib, loc. cit.

orientation towards the divide and rule patronage development tactics of the time.⁶

The democratisation period was characterised by two elements. First, political democratisation which sought to establish representative government, and economic liberalisation which was aimed at integrating South Africa into the global economy.⁷ The interplay between these two key elements influenced the development priorities of government. South African transition politics was therefore also a determinant of its development politics in the sense that it was not only about constitutional and political issues, but also about development priorities.⁸ The implication of this on the nonprofit sector was that although organisations engaged in service delivery had placed emphasis on the social side, traditionally their ties had been political, and a shift in political structures would affect the relationships with their traditional allies, and consequently their identity.⁹

The dynamics of civil society networking at this time soon manifested in 'the inherent tension between the formation of alliances to facilitate democratic transition, and the emergence of divisions in its aftermath.'¹⁰ As new alliances were shaped post apartheid, and the clear lines between resistance and oppressive organisations blurred, a major reorientation was required by the community and political organisations who had to learn, not just constitutional and political issues, but also about development priorities, as they moved into the field of negotiation.¹¹ Further, the debate over class versus race, which up till then had been subordinated by strategic imperatives of national liberation, surfaced and began to 'unwrap black community solidarity and expose the variety of interests in the community, the mass-based organisations and the

⁶ M. Narsoo 'The Rhythms of Saints and Scoundrels: An Attempted Identikit of Service Organisations' (Durban: Olive Organisation Development and Training, MULBERRY Series, 1996) p.4 .

⁷ Habib, op. cit. at 235.

⁸ Narsoo, op. cit. at 4 and 6.

⁹ Ibid at 9.

¹⁰ Greenstein, op. cit. at 3.

¹¹ Narsoo, op. cit. at 6.

disadvantaged.’¹² Describing these progressive dynamics of civil society activity in South Africa, Habib observes that:

‘Under apartheid, the adversarial-collaborative divide largely took a racial form with the bulk of white civil society establishing collegiate relations with the state, and the majority of black civil society adopting a conflictual mode of engagement. This racial divide began to blur in the transition period as significant sections of white civil society began to distance themselves from the apartheid. In the contemporary era, the racial divide has all but disappeared, with adversarial and collegiate relations extending across the entire ambit of civil society.’¹³

5.2.2 Nigerian Civil Society

Several explanations have been advanced for the growth of the nonprofit sector in Nigeria. Prominent among these explanations is the dual crises of militarisation and state failure in service provision at the intra-national level. In this regard, references have been made in the literature to people’s self-reliant efforts to solve common problems.¹⁴ While community based organisations served as the platform for addressing these individual needs, civil society agencies became the voice for these CBOs. Through its mission of promoting the expression of civil and socio-economic rights at a generic level, the human rights -cum- civic-advocacy organisation came to be regarded as the archetype of the nonprofit organisation in Nigeria.¹⁵

Civil society organisations gained prominence when it became obvious that government employees or government affiliated institutions could not successfully champion the campaign for a democratic agenda without coming up against their military employers and overseers.¹⁶

On the other hand, the inefficiencies of military rule served to emphasise the relationship between the economic objectives of trade unions and the

¹² Ibid. at 6 and 31.

¹³ Habib, op. cit. at 228.

¹⁴ See 3.2.1 supra.

¹⁵ Ibid.

¹⁶ Banwo, op. cit. at 48.

imperative of political reform, reinforcing a position earlier expressed by the left-leaning National Trade Union Congress of Nigeria (NTUC) as follows:

*'We must henceforth use our economic power whenever necessary to secure our political objectives. Having secured political power, we can then use it to alleviate our economic burden and secure a greater measure of social justice. That is the only way. You cannot remove the source of social injustice by limiting the activities of trade unions to mere bread and butter issues.'*¹⁷

The legacy of the anti-military civil society activity of the 1980s and 90s is that today, a motley assortment of community-based organisations, non governmental development agencies and civic advocacy organisations exist, carrying out nonprofit activity in Nigeria. The older and well established ones have well-defined organisational structures, typically with an advisory board or Board of Directors and a secretariat headed by an Executive Director who oversees the day-to-day running of the organisation, while some of the younger ones lack adequate organisational and professional staff base.¹⁸ The work will now proceed to compare the factors responsible for the growth of the nonprofit sector in Nigeria and South Africa.

5.2.3 Similarities in Growth Factors

One identifiable growth factor common to the nonprofit sector of both countries is the effect of government failure in the delivery of public goods on the associational life of people. 'Public goods' are defined as 'goods and services that cannot be provided to one citizen without being supplied also to the citizen's neighbours and once provided for one citizen, the cost of providing to others is zero.'¹⁹ These include roads, electricity, water supply, parks and public sanitary facilities.

In Nigeria, the failure of government in this way was one of the vagaries that attended its post-independence history, leading to its submergence in more

¹⁷ NTUC Policy Paper on Politics, considered in 1965, quoted in Akinyanju, op. cit. at 69.

¹⁸ Ibhawoh, op. cit. at 30.

¹⁹ Fakiyesi, op. cit. at 39.

than three decades of military rule, described in chapter three. The fact that this led to a growth in self-help activities by citizens and to the establishment of formal organisations dedicated to the observance of human rights illustrates the failure of government to meet its obligations to its citizens.²⁰ Similarly, the designed exclusion of sections of the population from political, educational, social and economic opportunities, by the South African government in the apartheid period was a failure on the part of government to deliver to large sections of the governed population, the entitlements of membership of the polity. It was the reaction to these two manifestations of government failure that fostered the growth of civil society in both countries.

Flowing from the above is a shared history of struggle, albeit of differing lengths and degrees. Through the struggle, first for representative governance in the 1920s to 1940s, and then for independence in the 1950s, Nigerian nationalists initiated forms of civil society activity that later assumed the character of political associations.²¹ Although the associations founded at that time subsequently metamorphosed into other kinds of organisations, it is submitted that the pre-independence experience served to acquaint the Nigerian citizenry with the mechanisms and benefits of formal processes of organizing. The anti-apartheid struggle in South Africa reflects a combination of all the stages of Nigeria's colonial experience at a greater magnitude, given the length, breadth and depth of settler domination. It therefore follows that resistance activity largely defined the character of the modern nonprofit sector in South Africa, and thereafter, supplied the leaders for the sector.

The history of struggle in both countries, reflecting government failure theory of the origins of civil society, worked to produce a common archetype of the nonprofit sector in both countries, namely the human rights, civic-advocacy non-governmental organisation. In South Africa, this is borne out by the fact that

²⁰ See 2.2.1 and 3.2.1 *supra* for discussions on the government failure theory of the nonprofit sector. Salamon (1999) also discusses this at 13.

²¹ Banwo, *op. cit.* at 42-4.

the campaign for a conducive legal framework which eventually culminated in the enactment of the Nonprofit Organisations Act 1997 in South Africa was led by key actors and organisations in South Africa's civic movement, who drew other types of nonprofit organisations into the process. Key institutional actors involved in the campaign were the Development Resources Centre and the Institute for Democracy in South Africa (IDASA).²² It is further instructive that it was the civic organisations that suffered the most restriction under the stifling fundraising laws of the pre-democracy era in South Africa, as they were perceived as opponents of the government.²³

Another point of similarity is that in both countries, formal, civil society organisations are heavily dependent on external donors for funding. This can be explained by the fact that activities of civil society in pursuance of civic rights and entitlements during the respective struggle periods of both countries were considered inimical to the agenda of the government of the day. Consequently, they fell outside government's 'development' activities, and did not qualify for fundraising permission in the case of South Africa. Similarly, adversarial relations characterised the engagement between the state and civil society through trade unions in South Africa and human rights organisations in Nigeria respectively.²⁴

Another aspect in which the development of the nonprofit sector in both countries is similar has to do with the effect of international fiscal policy and globalisation. The two countries experienced a departure from homegrown development models in favour of neo-liberal economic policies of the International Monetary Fund (IMF) and the World Bank together with the

²² Dangor, (1999b), op. cit. at 5.

²³ See discussion in 4.2.1 *supra*.

²⁴ See discussion in 3.2.1 and 4.2.1 respectively.

attendant withdrawal of the state from the economy, which in Nigeria, has been referred to as 'anti-statism'.²⁵

In the case of Nigeria, with the sharp decline in the prices of agricultural and mineral exports in the 1970s, the cuts in government expenditure on social services in the 1980s, and the corruption and mismanagement of the 1980s-90s, came a severe economic crises. This led to the replacement of the mixed economy development model adopted post-independence by the neo-liberal development models of the IMF and the World Bank as the condition for intervention by these multilateral bodies.²⁶ In South Africa, the Reconstruction and Development Programme was replaced by the Growth Employment and Redistribution Strategy in response to the imperative of growing the local economy while entering into the global economy.²⁷

This phenomenon, which saw the retreat of the state, expanded the roles of nonprofit organisations in the provision of social services in South Africa as earlier observed, while in Nigeria, the harsh effects of the implementation of the structural adjustment programme (SAP) by military governments eroded standards of living and led to disenchantment and unrest among the citizenry. This, in turn, found an outlet in many forms, including the campaigns of civil society organisations.²⁸ Indeed, it has been suggested that SAP by its very nature worked to validate the presence of the military in governance, the rationale being that 'because SAP policies are so unpopular, unjust and oppressive, they require this authoritarian state to impose structural adjustment policies in most countries....'²⁹

The demands of globalisation which led to the adoption of structural adjustment policies in developing countries also meant that the consequences of

²⁵ B. Onimode, 'Structural Adjustment, Development and Democracy – What Options for Africa?' in F. Adewunmi (Ed.) *Trade Unions, National Development and Military Rule* (Lagos: Friedrich Ebert Foundation and the Organisation of African Trade Unity, 1998) p.12.

²⁶ H. A. Sunmonu, 'Democracy, Development and Trade Unions' in F. Adewunmi (Ed.), *Ibid.* at 7.

²⁷ See discussion in 4.2.3 *supra*.

²⁸ See the discussion on this in 3.2.1, 3.2.3, 4.2.3 *supra*.

²⁹ Onimode, *op. cit.* at 13.

SAP became globalised, including civil society unrest.³⁰ This perhaps explains the similarities that are evident in the response of people to challenges encountered within similar development contexts. The similarities notwithstanding, interesting differences are found in the factors responsible for the growth of the nonprofit sector in Nigeria and South Africa. These are discussed in the next section.

5.2.4 Divergences in Growth Factors

A key factor which is more a difference of degrees than substance is the role of trade unions. In Nigeria, the involvement of trade unions in the forefront of mainstream rights struggle occurred in the years following independence. Prior to this time, they were largely circumscribed to the workplace and to issues immediately related to wages and subsistence.³¹ In South Africa however, they were central to civil society mobilization against apartheid in South Africa.³² Reference has been made to the 'overlapping of workplace and political struggle that characterised industrial relations during and after the 1970s.'³³

Another difference is in relation to the focal point of civil society activity. While civil society was organised around race in South Africa, thus giving a dual character to its nonprofit activity, in Nigeria, it was organised around interests opposed to military governance.

A third point of divergence emerged with the achievement of the respective focal points mentioned above. In South Africa, poverty alleviation succeeded the anti-apartheid struggle as the epicenter of civil society activity, whilst in post-military Nigeria, the focus shifted to the consolidation of democracy through the strengthening of the institutions of democratic

³⁰ Pieterse (1995b), op. cit. at 4.

³¹ See discussion in 3.2.4 and 3.7.2 supra. See also A. Akpala, *Critical History of Nigerian Industrial Relations 1937 – 1967* (Enugu: Department of Management, Faculty of Business Administration, University of Nigeria, Enugu Campus, 1993) Chapter 6.

³² See discussion in 4.2.1 and 4.5 supra.

³³ Du Toit et al, op. cit. at 9.

governance.³⁴ This multi-faceted process in Nigeria is carried out through activities directed at legislative, judicial, criminal justice and electoral system reform, local government administration, promotion of access to public information, in addition to the usual human rights and civic education activities.³⁵ South Africa already had strong, albeit exclusionary, institutions for democratic processes. Thus whereas Nigeria has had to rebuild its democratic structures, in some respects, from scratch, the critical need in South Africa was transformation. This singular factor is a key reason why the recommendations made in the concluding chapter of this work differ significantly in relation to both countries.³⁶

The accounts of the growth and development of the nonprofit sector in Nigeria and South Africa described in Chapters three and four respectively featured a description of the legal environment within which this was done. In the section that follows, an attempt is made to highlight the strong points as well as the shortcomings of the legal framework within which nonprofit organisations have to operate in both countries. Similarities and differences are also identified.

5.3 Legal Developments

The regulation of the nonprofit sector has been described in terms of sound government being a primary social institution, meaning that 'some form of authoritative regulation of social affairs is, perhaps unfortunately, necessary if we are to talk of civil society as opposed to anarchy.'³⁷ Another categorization of a legal regime for nonprofits describes legislation that would offer direct support in the form of state subsidies, indirect support through incentives such as tax

³⁴ See earlier discussion on this in 3.3 and 4.2.2 *supra*; see also SANGOCO website, <http://www.sangoco.org.za> featuring the 'Global Call to Action Against Poverty' (GCAD) accessed on 23/1/2006.

³⁵ See for instance, the programmes of organisations such as the Human Rights Law Service, the Constitutional Rights Project and the Media Rights Agenda at www.hurilaws.org, www.crpnnigeria.org and www.mediariightsagenda.org respectively, accessed on 3/1/2006.

³⁶ See 6.4.1 and 6.4.2 *infra*, for recommendations on South Africa and Nigeria respectively.

³⁷ Kaplan, *op. cit.* at 3.

concessions and regulatory legislation relating to registration.³⁸ Yet another author describes this subject in the following terms:

*'It needs to be considered what legislation can do positively to assist the non-profit sector. It should establish easy registration procedures, create accessible information about registration, give information to NPOs on benefits available and enable registration to be quick and efficient.'*³⁹

In this section of the work, the ways in which the law has been applied to the nonprofit sector of both countries will be compared under the three segments earlier identified. These are associational rights, registration and tax framework, and employment regulation.

5.3.1 Legal Framework for Associational Activities

In both South Africa and Nigeria, the respective constitutions recognize the right to freedom of association. The right to peaceful assembly and association is further supported by other constitutional guarantees of freedom of expression and the press, and freedom of thought, conscience and religion in both countries.⁴⁰

While the freedom to associate is unqualified in the South African Constitution, in the Nigerian constitution, it is qualified by the right of the Independent National Electoral Commission to withhold recognition from an association seeking to register as a political party.⁴¹ Further, this right is not intended to protect the formation or membership of secret societies.⁴² As Paul and Dias observe, 'the right to organise is not a right enabling some to use groups to exploit or repress others within or without the group, nor to use groups for corrupt purposes.'⁴³

³⁸ Kleinenberg, op. cit. at 11.

³⁹ Dangor et al (1997), op. cit. at 30.

⁴⁰ The Constitution of the Federal Republic of Nigeria 1999 (CFRN), ss. 38 and 39. See in contrast, The Constitution of the Republic of South Africa 1996, s.18.

⁴¹ CFRN 1999, s.40.

⁴² CFRN 1999, s.38(4).

⁴³ Paul and Dias, (1992b) op. cit. at 306.

In South Africa, the freedom of association is restated under the Labour Relations Act 1995 in the workplace context. The constitutional guarantee of choice of trade union membership in Nigeria means that parties to an employment contract are free to decide how to exercise that right.⁴⁴ In other words, the employer cannot require employees to join a particular trade union. An employee may however choose not to belong to a trade union for which he or she is eligible, in which case, the statutory provision that permits the deduction of trade union membership dues would cease to apply to him or her, but such an employee must first contract out of the system.⁴⁵

In Nigeria, the most glaring incursion into the freedom of association is the limiting effect of certain trade union laws which vest discretionary powers in the Minister to prescribe further categories of employees prohibited from unionizing, in addition to those already prohibited by statute.⁴⁶ This discretion may also be exercised negatively where the Registrar considers that any existing trade union is sufficiently representative of the interests of the class of persons whose interests the union is intended to represent.⁴⁷ Further, the President is empowered to proscribe trade unions in a unilateral exercise of discretion in certain circumstances.⁴⁸

Further amendments to the Trade Unions Act vested in the Minister the power to decide the expediency of registering a union either by regrouping existing trade unions or registering a new union.⁴⁹ These discretionary provisions were ostensibly borne out of the concern of the government at the time to streamline existing unions and avoid the overlap and duplication of unions, which often led to litigation and other anomalies.⁵⁰ However,

⁴⁴ E.E. Uvieghara, 'Nigerian Labour Laws – The Past, Present and the Future' (University of Lagos Press, Inaugural Lecture, 1987) p. 32.

⁴⁵ *Udoh & ors. v Orthopaedic Hospitals Management Board & Anor.* (1990) 4 NWLR (Pt.142) 52.

⁴⁶ Trade Unions Act 1973, Cap T14 Laws of the Federation of Nigeria, 2004 (TUA) s.11(1)(i).

⁴⁷ *Ibid.* s. 5(4)

⁴⁸ Trade Disputes (Essential Services) Act 1976 (TDA) s.1(1).

⁴⁹ TUA 1973, s.3(2), as amended by the Trade Union (Amendment) Decree No.22 1978.

⁵⁰ See G.O.S. Amadi, *A Legal Guide to Trade Unions* (Nsukka: Afro-Orbis, 1999) p. 23.

considering that union leaders had, by this time, taken on the role of rights crusaders, the covert agenda for the purported streamlining was to exercise firmer control over them.⁵¹ These powers were challenged on grounds of inconsistency with constitutional provisions on freedom of association in *Osawe v Registrar of Trade Unions*.⁵² In that case the appellant applied to have a trade union registered by the Registrar of Trade Unions, but was refused on the ground that there was already in existence a union which catered sufficiently for the interest of the same category of workers sought to be covered by the proposed union. The appellant's action against the Registrar's decision succeeded at the High Court, but was overturned at the Court of Appeal. The Supreme Court of Nigeria, confirming the Court of Appeal decision, maintained that the right of association conferred by s.37 of the 1979 Constitution was not an absolute right.⁵³

It need also be pointed out that unlike South Africa, Nigerian law does not recognise unregistered trade unions and accords no privileges to its members.⁵⁴ The subject of repressive laws made under past military regimes in Nigeria continues to draw the attention of civil society organisations.⁵⁵

In order to expand the space narrowed by this statutory incursion into the freedom to associate at the Nigerian workplace, several considerations have been suggested to guide the Registrar's wide discretion in deciding which union gets registered, rather than just the existence of another trade union in a particular industry or sub-sector. These factors include membership strength,

⁵¹ Ibid.; see also D. Ootob, 'Trade Unions-Government Relations Under Military Rule in Nigeria: An Overview' in F. Adewunmi (Ed.), op. cit. at 41 and 47.

⁵² *Osawe v Registrar of Trade Unions* (1985) 1 NWLR 755 p71.

⁵³ Section 37 of the 1979 Constitution provided for the right freedom of association which is now in s.40 of the 1999 Constitution.

⁵⁴ Section 2(1) TUA 1973. In contrast, see the South African case of *SANAWU v Maluti Crushers* J/671(LAC), where the Commissioner commented, obiter, that the rights accorded to employees in section 4 of the Labour Relations Act 1995 are equally applicable to membership of registered and unregistered trade unions.

⁵⁵ A Compendium of submissions by leading human rights activists highlighting laws that infringe on human rights and due process was published in C. Nwankwo and O. Lawal (Eds.) *Legislative Agenda for Legal Reforms and Human Rights* (Lagos: Constitutional Rights Project, 2002).

financial viability, contribution to industrial harmony and industrial input, in relation to associations seeking registration as a union.⁵⁶ Clarke et al assert that workers' right to freedom of association is further reinforced, at the international level, by the procedure of the Committee on Freedom of Association which provides for intervention in member states even without specific ratification of the Convention.⁵⁷

A point of similarity in the legal histories of the two countries under consideration lies in the fact that restrictive laws passed at various times, with the aim of advancing undemocratic governance by military governments in Nigeria and the apartheid government in South Africa largely had the opposite effect in both countries. In Nigeria, for instance, the State Security (Detention of Persons) Decree 1984⁵⁸ was used to incarcerate journalists and others who challenged or exposed the failings of the military government of the time. It was also around that period that specialized organisations dedicated to the protection of human rights began to emerge. First, it was in the form of an alliance of mainstream associations involved in rights issues which emerged in 1984, under the name Alliance for Democratic Rights. This was the precursor to specialized human rights organisations like the Civil Liberties Organisation in 1989 and Constitutional Rights Project in 1990.⁵⁹

In South Africa, the proscription of mixed trade unions, coupled with the non-recognition of trade unions made up of black workers in the mid-60s resulted in the rapid growth of unregistered unions among black workers in the 1970s.⁶⁰ Sustained exclusion of this group of workers continued through the 1980s by the circumscribed meaning given to 'employee', even after the Wiehahn

⁵⁶ E.S. Nwauche, 'Legal Perspective on the Formation and Registration of Trade Unions in Nigeria' in *The Nigerian Business Law and Practice Journal* Vol.3 Nos 1 and 2, 1997, p75.

⁵⁷ M. Clarke, T. Feys and E. Kalula, 'Labour Standards and Regional Integration in Southern Africa: Prospects for Harmonisation' (Institute of Development and Labour Law, University of Cape Town, Development and Labour Monographs No. 2 1999) at 33.

⁵⁸ Decree No.2 of 1984.

⁵⁹ See earlier discussion on this in 3.2.4 supra.

⁶⁰ Finnemore, op. cit. at 36.

Commission submitted its recommendations for reforms doing away with racial division in trade union law. The reaction to this was the spate of resistance activities which ultimately led to the declaration of a state of emergency in 1985, and again in 1986.⁶¹

The foregoing discussion on the dynamics of civil society engagement with legal provisions on associational rights in South Africa and Nigeria demonstrates the potential of law to exert a positive influence or effect a negative impact on associational life. The next section of the work builds on the earlier examination of the legal framework of the nonprofit sector in both countries to highlight comparatively other provisions that contribute to this legal environment.⁶²

5.3.2 Registration Framework

The subject of legal requirements for the establishment and work of nonprofit organisations is rooted in a number of ethical grounds. On the one hand, it is felt that the nonprofit sector exercises ownership of the values of civil society, and on another level, that since nonprofit organisations subsist on donor funding meant for specific purposes, their activities must be seen to be above board.⁶³

In this regard, significant progress has been made in South Africa with the enactment of the Nonprofit Organisations Act 1997 (NPO Act) which deals, not only with the registration, but also with the administration of nonprofit organisations. This is yet to be achieved in many other jurisdictions, including Nigeria, where a few unsuccessful attempts have been made in this direction since the transition to civilian rule in 1999. One such proposal for the establishment of a Civil Societies Commission to provide for the registration of certain kinds of associations was initiated by a senator in 1999. Following this, a stakeholder forum was convened to solicit the input of civil society associations into the process. The draft bill was faulted by representatives of various

⁶¹ Du Toit et al, op. cit. at 14.

⁶² See earlier discussion on this in 3.4 to 3.7 and 4.4 to 4.7 supra, respectively.

⁶³ Kaplan, op. cit. at 21; Kleinenberg, op. cit. at 5.

nongovernmental organisations on numerous grounds, but essentially out of the concern that if passed, it had the capacity to restrict the space for the work of civil society and other nonprofit organisations.⁶⁴ This was most likely a reaction borne out of the all too fresh memories of the harrowing experiences of military rule. The process deadlocked and the bill never emerged.

A second attempt was made in 2001, when a bill was sponsored by a member of the House of Representatives, seeking to provide for the registration of all non-governmental organisations operating in Nigeria with the aim of overseeing their activities and generally harmonizing their operations.⁶⁵ The bill provided for the establishment of a Nongovernmental Organisations Registration Council, with a membership equally made up of ministerial appointees from donor agencies and representatives of nongovernmental organisations. The Council proposed under this bill would, among other things, be responsible for determining the authenticity of nongovernmental organisations operating in Nigeria, setting out a code of conduct and ethics for them, as well as monitoring and evaluating their standards of operation. For this purpose, the Council was to be empowered to do anything which in its opinion was calculated to facilitate the carrying out of its function under this Act, while a Registrar would be appointed to maintain a register of names and addresses of non-governmental organisations.⁶⁶ Unlike its stillborn predecessor, this bill was not known to have been prepared with any contribution from nonprofit sector organisations, and not much has been heard of it since its first presentation at the House of Representatives.⁶⁷

The difference between the Nigerian attempts at nonprofit sector regulation and the South African process leading to the enactment of the Nonprofit Organisations Act 1997 is that while the latter was driven by

⁶⁴ *Assembly Watch* (Newsletter of the Constitutional Rights Project, Vol.2, No.12, May 2001), pp.2-3.

⁶⁵ *Ibid.* at 1-3.

⁶⁶ Section. 3 of the proposed bill as reported in *Assembly Watch*, *Ibid.* at 1-3.

⁶⁷ *Ibid.*

practitioners in the nonprofit sector, the former seems to be an initiative of the state, channeled through members of the Legislature. It is noteworthy that the process leading to the emergence of the Nonprofit Organisations Act in South Africa was also attended with suspicion of government involvement among some nonprofit organisations and indeed resistance to the prominent role played by certain key organisations.⁶⁸ Still, the South African experience emphasises the necessity of a process that is inclusive of all stakeholders from the onset. As Dangor observes,

*'With the benefit of hindsight it would have been better for us to approach the Welfare Department early in 1994. This would have allowed us to recognize that there was a high level of commonality around values regarding the regulation of non-profit organisations ... an important lesson has been that a democratically elected government is ultimately the key agent in concluding public policy change processes and that relevant government organisations and officials need to be brought on board early rather than later in public policy change processes initiated outside of government. Partnerships around these changes are, however, dependent on the level of agreement on values around the specific public policy issues.'*⁶⁹

The above differences notwithstanding, as the respective legal provisions stand, points of similarity exist in the legal modes of creating a nonprofit agency in the two countries. As earlier mentioned, the NPO Act recognizes three ways of creating a nonprofit organisation, by its definition of 'nonprofit organisations' as 'trust, company or other association of persons (a) established for a public purpose; and (b) the income and property of which are not distributable to its members or office-bearers except as reasonable compensation for services rendered.'⁷⁰

In Nigeria, the registration of a nonprofit organisation may be done by registration as a company limited by guarantee, or as an incorporated trustee

⁶⁸ Dangor (1999b), op. cit. pp. 1-9, esp. at 7.

⁶⁹ Ibid. at 1-2.

⁷⁰ NPO Act 1997, s.1.

under the Company and Allied Matters Act 1990.⁷¹ These two modes are similar to the first two types of nonprofit organisations recognised by the NPO Act. The law also recognizes the association of persons for lawful purposes through the constitutional provisions on freedom of association earlier discussed.⁷²

5.3.3 Funding and Tax Framework

There is a general presumption that nonprofit organisations in Nigeria are tax exempt based on the joint effect of the provision of the Companies Income Tax Act 1979 and the Companies and Allied Matters Act 1990. Since the machinery for tax collection outside the public service and the organised private sector in Nigeria has been notoriously inefficient, this makes it even harder to study the operation of tax laws on nonprofit entities. On the other hand, it makes it relatively easy for nonprofit organisations to take refuge in the broad provisions of the law in this subject since no specific amendment has been made in recent times to tax provisions for nonprofits. As it stands, the Companies Income Tax Act 1979 (CITA) provides for tax exemption to, among others, organisations engaged in 'ecclesiastical, charitable or educational activities of a public character 'in so far as such profits are not derived from a trade or business carried on by such company.'⁷³ It further exempts any company formed for the purpose of promoting sporting activities where such profits are wholly expendable for such purpose, subject to such conditions as the Board may prescribe.⁷⁴

It is noteworthy that the exemption is in respect of 'profits', when in the same breadth the proviso to the exemptions excludes profits from trade or business carried out by the organisation. The use of the term 'profits' suggests therefore that 'income' is intended and it is submitted that this would be a better term to use in relation to the treatment of nonprofit organisations in the CITA.

⁷¹ Companies and Allied Matters Act 1990, ss.21(b) and 673; see earlier discussion on this in 3.6.1 supra.

⁷² CFRN 1999, s. 40; see also earlier discussion in 3.5 supra.

⁷³ Companies Income Tax Act 1979, s.19(1)(c)

⁷⁴ Section 19(1)(d).

With regard to donor deductibility for nonprofit agencies, the Act limits the classes of organisations to 'ecclesiastical, charitable, benevolent, educational and scientific institutions.'⁷⁵

It seems that in South Africa, the pursuit of legal and tax reform for the nonprofit sector primarily grew out of the acute funding needs of the sector. South African NGOs have depended on a wide variety of sources for funding, focusing primarily on foreign funding. After the 1994 elections, the Transitional National Development Trust (TNDDT) was established as an interim institution to provide funds for civil society organisations through the transition period, but it remained till 2000 when it was replaced by the National Development Agency (NDA) in 2000.⁷⁶ Another source to which the South African nonprofit sector has looked for funding before initiating legal and tax reform is the national lottery which raises funds, thirty percent of which is designated for civil society organisations.⁷⁷

In South Africa, the tax lobbying campaign carried out by nonprofit organisations grew out of the conviction among nonprofit organisation leaders that tax incentives could influence charitable giving. This was based on the findings of the *Independent Study into an Enabling Environment for NGOs*, an initiative led by the research NGO, Development Resource Centre in 1992. As a result of the campaign, the Katz Commission of Inquiry was set up to investigate certain aspects of the South African tax structure, which, in May 1999, submitted its ninth interim report focused specifically on the taxation of nonprofit organisations.⁷⁸ Upon the recommendations of the Commission, certain budgetary proposals affecting nonprofit organisations were made. These would have the effect of expanding the definition of 'public benefit organisation' and

⁷⁵ Section 25(4).

⁷⁶ Smith, op. cit. at 7.

⁷⁷ Ibid.

⁷⁸ R. Wyngaard and P. Dlamini, 'The Income Tax Act and Sustainable Development: Do the Provisions of the Income Tax Act, As Amended, Promote Financial Sustainability in the Sector?', accessed at [www.projectliteracy.org.za/tmpl/Documents/Penny%20and %20Ricardo.doc](http://www.projectliteracy.org.za/tmpl/Documents/Penny%20and%20Ricardo.doc) on 25/3/2004, p3.

extending the benefit of deductibility of donations to a broader range of entities.⁷⁹ Further, intense negotiations between nonprofit organisations and the South African Revenue Service, led by the Nonprofit Partnership and the Legal Resources Centre yielded the amendments introduced by the Taxation Laws Amendment Act 2000 (TLAA) which came into effect on July 15, 2001.⁸⁰

Several key changes were made by the TLAA. First was the removal of the limitation of tax exemption to 'charitable, educational and religious institutions' and the introduction of the term 'public benefit organisation' (PBO) to determine eligibility for tax exemption.⁸¹ Authors are of the opinion that tax exemption for nonprofit organisations provided by section 10 of the Income Tax Act 1962 is not limited to income tax, but extends to various kinds of taxes and levies, such as donations tax, transfer duty, estate duty, capital gains tax, stamp duty, skills development levy and regional services levies.⁸²

The amended Act prescribes the procedure for the application for tax exemption by a public benefit organisation (PBO). Essentially an application form is completed and submitted, supported by the founding document of the organisation, complying with certain requirements set out in section 30 of the Act. These requirements prescribe the permissible kinds of investments and the limits of any business carried out by a PBO for profit. Other requirements are either prohibitory or mandatory. For instance, a PBO is precluded from accepting certain revocable donations, as well as from participating in a tax avoidance or reduction scheme. They are further precluded from paying employees or office-bearers excessive remuneration.⁸³

On the mandatory side, a public benefit organisations is required to submit amendments to its founding document to the Commissioner of Inland Revenue comply with reporting requirements and register under the NPO Act

⁷⁹ Ibid. at 2-4.

⁸⁰ Act 30 of 2000; see also Wyngaard, *Income Tax Act (ITA)* at 4.

⁸¹ Income Tax Act 1962 s. 10(1) as amended by the Tax Laws Amendment Act 2000.

⁸² Wyngaard and Dlamini, *op. cit.* at 5.

⁸³ Income Tax Act 1962, (ITA) as amended, s.30.

1997.⁸⁴ It is noteworthy that the three types of entities eligible for tax exemption under the Income Tax Act are the same as those recognised under the NPO Act, namely a section 21 company, a trust or an association of persons carrying on public benefit activities within South Africa.⁸⁵ This clearly makes for congruence and consistency in the legal environment for nonprofit organisations in South Africa.

As earlier observed, the nonprofit status does not automatically confer tax exemption on a nonprofit organisation. Rather, the organisation must meet the provisions of section 10 of the amended Income Tax Act.⁸⁶ The sequence for gaining tax exemption status by nonprofit organisations is first to register with the NPO Directorate under the NPO Act and then to apply to the Department of Social Welfare for tax exempt status under section 18A of the Income Tax Act 1962.⁸⁷

With regard to donor deductibility, only donations made to an *approved* PBO and certain other bodies carrying out public benefit activity within South Africa qualify for donor deductibility. The implication is that donor deductibility is conferred by reference to the status of the organisation, rather than the character of the project carried out by the PBO. In turn, it is the nature of the projects that an organisation carries out that secures the approval needed for tax exemption. Thus an organisation's tax exempt status does not automatically confer donor deductibility to donations made to it. It has been suggested that local funding leans more towards organisations with donor deductible status.⁸⁸ Prior to the 2000 amendment, donor deductibility was limited to formal educational institutions like secondary schools, universities,

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ See discussion in 4.6.2 *supra*. See also Keith Huxham and Phillip Haupt, *Notes on South African Income Tax* (24th Ed., Roggebaai: Hedron Tax Consulting and Publishing CC, 2005), p.52.

⁸⁷ See Ricardo Wyngaard, "Becoming a Public Benefit Organisation: Demystifying the NPO Tax Laws" (The Tax Communication and Services Programme of the Non-Profit Partnership, October 2001), accessed at www.cafonline.org/downloads/word7/saPublicBenefitOrganisation.doc on 5/3/2005.

⁸⁸ Wyngaard and Dlamini, *op. cit.* at 7.

colleges and educational funds. Under the amended tax law, the list of organisations eligible for donor deductibility has grown but remains shorter than that for tax exemption.⁸⁹

The public benefit organisation status therefore confers eligibility for three key classes of benefits, namely, income tax exemption, donor deductible status and ancillary exemptions, which include exemption from estate duty, stamp duty, capital gains tax, skills development levy and similar taxes.⁹⁰ Although the provisions of the 2000 tax law amendment have had the effect of expanding the category of organisations covered by tax exemption and donor deductibility, it is felt that there is still room for further expansion. It has been suggested that one way of doing this could be by adding an omnibus provision adding to the definition of public benefit association 'or any other similar activity engaged in primarily for the benefit of the public.'⁹¹ The campaign for further tax reform is still on by coalitions of nonprofit organisations such as the Nonprofit Consortium, formerly known as the Nonprofit Partnership.⁹²

5.3.4 Employment Relations and Law in the Nonprofit Sector

The employment relationship provides a framework that enables the worker to participate in the economic life of the community in terms of basic needs such as food, access to housing, healthcare and development.⁹³ Consequently, laws applying to workers and workers' organisations must be responsive to changing economic circumstances and cater to workers' needs, especially the need for security of employment, fair wages, and fair terms and conditions of

⁸⁹ See ss. 18A and 30 of the Income Tax Act as amended.

⁹⁰ Wyngaard, op. cit. at 3.

⁹¹ Wyngaard and Dlamini, op. cit. at 10.

⁹² See article titled 'Strengthening Tax Benefits for Nonprofits' in http://www.usaid.gov/stories/southafrica/ss_southafrica_nonprofit.html, accessed on 27/1/2006. See also <http://www.npp.org.za/> accessed on 27/1/2006.

⁹³ N.J. Udombana, 'Socio-Economic Rights and the Nigerian Worker' in *Modern Practice Journal of Finance and Investment Law* Vol.3, No.2 (1999) p. 398.

employment.⁹⁴ The basic character of nonprofit sector activity is such that the staff constitute the operational link between the funder and the target population. It is for this and other reasons earlier discussed in chapter one, that employment relations in the nonprofit sector is considered a relevant point of intersection between the nonprofit sector and the law.⁹⁵

The primary factor in the employment relationship is the agreement constituting the contract of employment, while the secondary factor is the trade union, where one exists, which undergirds the contract of employment.⁹⁶ This secondary element is important, not only for the support it provides for individual employees, but also for the avenue it creates for involvement in advocacy and public debate around development processes.⁹⁷ However, this secondary element is missing in nonprofit sector employment, and with it, some of the benefits that accrue. Generally speaking, trade union membership confers a variety of benefits on workers such as group mechanisms for the defence of workers' rights, the improvement of employment conditions, the provision of social security, workers' education, co-operatives and other workplace based benefits.⁹⁸ On the other hand, the fact that nonprofit organisations are themselves proponents and agents of participatory development, means that other forums and channels are created within organisations to replace the missing secondary factor. This is strongly supported by my findings from the surveys and interviews conducted both in Nigeria and South Africa.

The common feature of employment law in both jurisdictions is that laws generally applicable to the private sector cover nonprofit organisations, since the latter is, broadly speaking, located within the former. In the case of South Africa,

⁹⁴ Amadi, *op. cit.* at 126.

⁹⁵ See research justification in 1.3 and scope of study in 1.4 *supra*.

⁹⁶ Amadi, *op. cit.* at 112 and 114.

⁹⁷ F. Adewunmi, 'Workers' Participation in the Development Process: Issues and Options' in F. Adewunmi (Ed.), *op. cit.* at 32.

⁹⁸ Sunmonu, *op. cit.* at 2.

the same broad legal provisions apply to all sectors of employment, apart from the groups excluded on account of national security.⁹⁹

In Nigeria, employment relations were based on the English common law system with its emphasis on voluntarism, largely governed by the individual contract of employment and collective bargaining, until after the civil war which lasted from 1967 to 1970.¹⁰⁰ Significant statutory intervention was made by the Labour Act 1974. The rationale for statutory intervention in employment relationships was the recognition of the worker's subordinate position to the employer and consequently the need of the former to be protected from the unfair exercise of the latter's power. The unequal power relations informed the description of the employment contract as a 'contract of adhesion', in which the employee simply agrees to adhere to the employer's terms and conditions.¹⁰¹ The introduction of a statutory floor of rights by the 1974 Act was thus a welcome development for the class of workers to whom it applied.

The inclination of Nigerian labour statutes in response to this imbalance in the individual employment contract has been to protect low skilled workers who are perceived as more vulnerable to the economic power of the employer, typically the class of workers described as manual and clerical.¹⁰² This is a major difference between employment law in Nigeria and South Africa. Key labour statutes in South Africa do not distinguish between different cadres of employees, but applies equally to workers in every sector, except for certain security and essential service agencies as earlier mentioned.¹⁰³

Employment relations in the nonprofit sector seems not to have drawn the attention of labour law scholars in Nigeria. The focus has been on the public and commercial sectors, and even then, the emphasis has been on labour-capital

⁹⁹ See Labour Relations Act 1995 s.2; Basic Conditions of Employment Act 1997 s.3 and Employment Equity Act 1998 s.4(3).

¹⁰⁰ Uvieghara and Agomo, op. cit. at 25.

¹⁰¹ C.K. Agomo, 'Natural Justice and Individual Employment Law in Nigeria' in I.O. Agbede and E.O. Akanki (Eds.), *Current Themes in Nigerian Law* (Lagos: Faculty of Law, University of Lagos, 1997) p. 95.

¹⁰² Uvieghara, op. cit. at 9.

¹⁰³ See 4.7.1 to 4.7.3 supra.

relationships. Issues of industrial democracy in the business sector in Nigeria are still emerging from labour-capital relationships and largely rests on the goodwill of employers.¹⁰⁴ Moreover, concepts developed from traditional labour law are not easily transferable to the nonprofit sector for several reasons. For instance, with regard to worker participation, proposed models have been recommended for employees in industries such as manufacturing, construction and commerce employing at least fifty people.¹⁰⁵ Admittedly, this came at a time when the modern type of non-governmental organisation was emerging and the concept of nonprofit organisations as a sector was yet to take shape.

In South Africa, the floor of rights concept also underpinned the overhaul of South Africa's labour laws after the 1994 elections. The existing body of labour law, was critiqued on the grounds that it was too complicated for ordinary workers, that it operated too slowly and that it was regulated by too many disparate statutes and regulations.¹⁰⁶ In addition, and perhaps more importantly, it failed to deal with significant categories of employees, and did not effectively promote collective bargaining or dispute resolution.¹⁰⁷

Positive intervention in employment relations in South Africa in respect of the general population commenced after the 1994 general elections with the enactment of the Labour Relations Act 1995 following the work of the Ministerial Legal Task Team appointed in 1994.¹⁰⁸ Earlier recommendations for non-racialised industrial relations by the Wiehahn Commission were not implemented in any material respect.¹⁰⁹

¹⁰⁴ H.S.N. Okoli, 'Industrial Democracy: Whither Nigeria' in I.O. Agbede and E.O. Akanki (Eds.), op. cit. at 185 – 206.

¹⁰⁵ See for example, M.T. Okorodudu, 'Structural Framework for Workers' Participation in Management: A Proposal' in Ajomo and Oluyede (Eds.) *Nigerian Current Law Review* 1983 p.274.

¹⁰⁶ J. Grogan, *Workplace Law*, (7th Ed. Cape Town: Juta, 2003) p. 2.

¹⁰⁷ Ibid. at 2.

¹⁰⁸ See the *Explanatory Memorandum of the Ministerial Legal Task Team January 1995* in (1995) 16 ILJ 278 at 279. The Committee was popularly known as the 'Cheadle Committee' after the name of the Chair of the Committee, Mr. Halton Cheadle.

¹⁰⁹ Du Toit et al, op. cit. at 22.

Legislative intervention into the common law on employment in South Africa, as in many commonwealth countries, became necessary on account of the inability of the common law to respond to changing circumstances in the employment scene, such as the collective bargaining relationship and the inequality in bargaining power between employer and employee. Further, it ignored the enduring nature of the employment relationship and gave employees no legal right to demand better conditions of employment, failed to promote participative management and provided no job security since the employment was at will. The inequities promoted by the concept of freedom of contract and the likelihood of exploitation by the employers who are the owners of the means of production were issues that remained unaddressed by the common law.¹¹⁰ It is important to point out that whilst South African labour law has its early origins in Roman-Dutch law, the work of colonial courts in interpreting the law and their recourse to English law and the writings of English jurists in litigation between employers and employees resulted in South African employment law reflecting both Roman-Dutch and English law principles.¹¹¹

Statutory remedy of inequalities between employers and employees at common law took three main forms. These were the stipulation of minimum conditions of employment for employees generally or in respect of particular classes of employees, the promotion of the concept of collective bargaining, and the creation of specialist tribunals to create equitable principles for the workplace, with the power to enforce those principles.¹¹² These principles were reflected in the provisions of the Labour Relations Act 1995 (LRA) and the Basic Conditions of Employment Act (BCEA) which jointly provide minimum standards for employment terms and conditions.¹¹³

¹¹⁰ Grogan, *op. cit.* at 5.

¹¹¹ *Ibid.* at 4.

¹¹² *Ibid.* at 5.

¹¹³ See previous discussion of these statutes and others in 4.7 *supra*.

The LRA was one of several statutes enacted to remedy these issues, by drawing from the innovations developed by more enlightened employers and trade unions by private arrangement, and attempting to codify some of the guidelines and principles evolved by the labour courts under the previous regime, and to settle matters which have been left moot.”¹¹⁴

In Nigeria, the post-civil war changes made to Nigerian labour law in the early 1970s included initiatives to promote and encourage the acquisition of skills in industry and commerce with a view to generating a pool of indigenous trained personnel sufficient to meet the needs of the economy.¹¹⁵ This was done by means of the Industrial Training Act 1971 which established the Industrial Training Fund, similar to the Skills Development Act 1998 in South Africa.

Statutory provisions on workplace disputes in Nigeria are found in the Trade Disputes Act 1976 which provides four progressive levels for the settlement of trade disputes. However, trade disputes, as used in the Act, refers to disputes between trade unions and employers, not to individual employees. Therefore, while the South African Labour Relations Act sets out dispute resolution procedures for individual and collective employment, the Nigerian Trade Disputes Act deals only with disputes between trade unions and employers or employers’ association. Judicial redress for the individual employee, including the nonprofit sector employee, must be sought at the High Court.¹¹⁶

While therefore, the common law still operates to create the employer-employee relationship in Nigeria, its role in regulating that relationship has been significantly reduced by other sources, principally statute and to a lesser degree, the declining effect of collective bargaining.¹¹⁷ However, the absence of collective bargaining structures in the nonprofit sector means that the statutorily

¹¹⁴ Grogan, *op. cit.* at 7.

¹¹⁵ Uvieghara, *op. cit.* at 26.

¹¹⁶ *Ibid.* at 40.

¹¹⁷ *Ibid.* at 47.

created floor of rights is even more relevant to employment in this sector, if employment is seen as a framework for the meeting of needs to which workers are entitled under the Constitution and under international law.¹¹⁸

To sum up the discussion on the development of the legal environment for the nonprofit sector, it is submitted that a blend of initiatives from the nonprofit sector and a complementary government policy should be the goal. In this respect, a model incorporating three complementary and sequential strategies for 'policing and defending the legitimate not-for-profit sector' has been proposed.¹¹⁹ The first is an internal strategy originating within the nonprofit sector, the second a joint nonprofit sector - government strategy and the third, the establishment of a government agency dedicated to administrative oversight of nonprofit organisations.¹²⁰ The first would perform the internal role which professional ethics bodies perform in relation to various professions, the second would be a form of partnering with government to investigate malfeasance, while the third would be a strategy of last resort.¹²¹ Having examined some pertinent legal issues affecting the nonprofit sector in Nigeria and South Africa, the work will proceed to discuss some emerging trends in both countries. Trends are discussed in the context of indicators from literary sources as well as empirical findings from exploratory interviews conducted with staff of nonprofit organisations in Nigeria and South Africa, as reported in Appendices A to E.

5.4 Trends in Nonprofit Sector Operations in South Africa and Nigeria

The structure and work of the nonprofit sector in countries that have undergone successful transitions to democratic governance often undergo significant changes. In this respect, factors that are distinct from the law have an impact on

¹¹⁸ Udombana, op. cit. at 398.

¹¹⁹ J.L. Fleishman, 'Public Trust in Not-for-Profit Organisations and the Need for Regulatory Reform' in C. Clotfelter and T. Ehrlich (Eds.) *Philanthropy and the Nonprofit Sector in a Changing America* (Bloomington: Indiana University Press, 1999) p.172.

¹²⁰ Ibid. at 186-8.

¹²¹ Ibid.

the sector, resulting in discernible trends. In this section, some trends are discussed under three heads, namely, government-nonprofit sector relations, funding and staffing, while other general developments are highlighted.

5.4.1 Government –Nonprofit Sector Relations

In South Africa, the dominant paradigm of civil society as associations and people opposed to the state had to give way to a redefinition 'when it became evident that the implicit understanding of an antagonistic relation between government and civil society would not be useful with the election of an ANC government into power.'¹²² The situation was further complicated by the speedy move by foreign donors to support the government's reconstruction and development programme to ensure more even and prioritised distribution. This development was perceived as problematic in the nonprofit sector, as structures and channels were not yet in place for the Reconstruction and Development Programme (RDP), but viable projects already being run by community based organisations were deprived of funding support in this way.¹²³

Scholars have since identified the emergence of two additional blocs of civil society in the post apartheid era, in response to the demands of globalisation and the neo-liberal policies of the ANC government, with the result that three distinct blocs of civil society now exist in South Africa.¹²⁴ These are, on one end, the informal community based survival related associations, which arose out of the state retreat from social service delivery and are uninvolved with government. On the other end are social movements actively challenging government, and in between, the older, formal, service related nongovernmental organisations serving as government subcontractors and partners in response to a more enabling environment created by the government.¹²⁵

¹²² Pieterse (1995a), op. cit. at 9.

¹²³ Ibid. at 10.

¹²⁴ Habib, op. cit. at 238-9.

¹²⁵ Ibid.

The post-opposition forms of nonprofit activity called for new skills and an expanded agenda tailored to the needs of target groups under the new political dispensations. While in Nigeria, this has taken the form of collaborations between civil society organisations and government agencies, in South Africa, many nonprofit organisations have taken on increased service delivery roles by contracting with government for this purpose.¹²⁶

In South Africa, the RDP created the immediate policy climate within which the nonprofit sector had to work in the transition period. This was a framework that advocated the adoption of an integrated approach to the development needs of South Africa, the maintenance of sound macro-economic policies, and the centrality of employment creation.¹²⁷ Other key thrusts of the RDP were the convening of social partnerships where representatives of the different sectors met to brainstorm on various policy issues, the recognition of the imperative of developing mechanisms for planning, monitoring and evaluation, rationalisation and development of the information gathering and processing capacity of government.¹²⁸

The government's method of administering the RDP was however, considered to be 'overly technocratic' and not creating much room for the involvement of social actors.¹²⁹ Bottlenecks attending the release of funds to nonprofits served to reinforce this perception of government as hostile to the nonprofit sector.¹³⁰ RDP macro-economic policies were interpreted at two levels, namely government consumption patterns and the creation of an investment friendly environment.¹³¹ It would seem that subsequently the programme became lopsided in favour of the latter, which eventually became the dominant

¹²⁶ See 3.3 and 4.3.1 respectively.

¹²⁷ Pieterse (1995a), op. cit. at 4.

¹²⁸ Ibid.

¹²⁹ Pieterse (1995b), op. cit. at 1.

¹³⁰ Smith, op. cit. at 15.

¹³¹ Pieterse (1995a), op. cit. at 4.

paradigm of the Growth, Employment and Redistribution programme (GEAR) in 1996.

The transition from RDP to GEAR resulted in the reconstitution of South African civil society in two major ways. First, as earlier observed, was the rise of informal survivalist grassroots associations virtually existing in isolation from the state, while other social movements on the other hand, actively engage the state in response to the effects of neo-liberal economic policies on social welfare issues. Such movements include the Treatment Action Campaign (TAC), Soweto Electricity Crisis Committee (SECC), Homeless Peoples Federation and Concerned Citizens Group (CCG).¹³² These developments produced a plurality and fluidity of civil society relationships to the state, described as follows:

*'A recognition of the heterogeneity of civil society must as a corollary recognize the inevitable plurality in state-civil society relations These diverse roles and functions undertaken by different elements of civil society, then, collectively create the adversarial and collaborative relationships, the push and pull effects, which sometimes assist and other times compel the state to meet its obligations and responsibilities to its citizenry. The plurality of civil society and the diverse sets of relations that it engenders with the state is thus the best guarantee for the consolidation of democracy in South Africa.'*¹³³

The experience of older democracies shows that government-nonprofit relations in the long run, possess a fluid, dynamic character, attaining varying levels of co-operation and suffering various kinds of misperceptions, depending on the socio-political and economic paradigm of the era.¹³⁴ In the United States for instance, the 'New Deal' era in the post-depression years and its World War II successor, the 'Great Society' era, were characterised by increases in government social welfare expenditures, inducing some fear of an enlarged bureaucratic and monolithic government taking on social functions previously performed by other

¹³² Habib, op. cit. at 237 and 239.

¹³³ Ibid at 239-40.

¹³⁴ These dynamics are discussed in depth in D. R. Young, 'Complementary, Supplementary, or Adversarial? A Theoretical and Historical Examination of Nonprofit-Government Relations in the United States', Chapter 1 of E.T. Boris and C.E. Steuerle (Eds.) *Nonprofits and Government: Collaboration and Conflict* (Washington D.C.: The Urban Institute Press, 1998).

social institutions.¹³⁵ This was followed by structural economic shifts which saw government spending on social services leveling out in the 1970s and reducing in the 1980s, with a corresponding decrease in the growth rate of the nonprofit sector in the early 1980s.¹³⁶

The post-2000 era in the US has since seen a value shift with the focus on issues such as globalization, migration, homeland security, which has in turn heightened the sense of sectoral interdependence, leading to the twin observation that 'More than any other single factor, this government-nonprofit partnership is responsible for the growth of the nonprofit sector as we know it today.', and that '... nonprofit organisations and businesses have begun reaching out to each other across historical divides of suspicion to forge interesting collaborations of value to both...'¹³⁷

In Europe, a number of national governments have entered into co-operative agreements, otherwise described as 'compacts' with the umbrella nonprofit sector bodies. This is so in the United Kingdom, France, Denmark, Croatia and Estonia, as well as in the North-American state of Canada.¹³⁸ The conclusion to this section is captured in an earlier observation that reinforces the plurality and diversity which characterise civil society and by extension, nonprofit organisations, as follows:

*'In all communities a wide spectrum of associational life exist. It is largely counter-productive to spend a lot of energy to stay abreast of everything and seek ways to control and regulate it. Allow diverse associational activities to breathe and flourish independently and isolate the strategic points of intersection to build community-based alliances around very specific campaigns and issues.'*¹³⁹

¹³⁵ Salamon (1995), op. cit. at 37.

¹³⁶ V.A. Hodgkinson and M.S. Weitzman, 'The Independent Sector: An Overview' in D.L. Gies, J.S. Ott and J.M. Shafritz (Eds.) *The Nonprofit Organisation: Essential Readings* (Pacific Grove: Brooks/Cole Publishing Company, 1990) p. 45.

¹³⁷ L. Salamon, 'The Resilient Sector: The State of Nonprofit America' in L. Salamon (Ed.) *The State of Nonprofit America* (Washington DC: Brookings Institution Press, 2002), pp. 5 and 41.

¹³⁸ R. Toftisova, 'Implementation of NGO-Government Cooperation Policy Documents: Lessons Learned' in *The International Journal of Not-For-Profit-Law*, Vol. 8, Issue 1, Nov. 2005, accessed at http://www.icnl.org/journal/vol8iss1/special_2.htm on 31/12/2005.

¹³⁹ Pieterse (1995a), op. cit. at 15.

5.4.2 Funding

Shifts in funding patterns resulting from re-prioritisation by funders have been experienced by the nonprofit sector in both countries. In South Africa, the funding crisis in the nonprofit sector was ascribed to the changes in funding pattern, brain drain of personnel to public and private sectors, stringent reporting requirements and demonstrable results as a funding condition from government and foreign donors.¹⁴⁰

While many foreign donors redirected funding to democratically elected post-apartheid government to facilitate the take-off of the RDP programme in South Africa, the Nigerian nonprofit sector experienced a similar shift in terms of activities. Foreign funders redirected funding support to activities aimed at strengthening the institutions of democracy such as training activities for legislators. This necessitated a re-focusing of efforts by nonprofit organisations on capacity building and skills development, moreso in South Africa where the cream of nonprofit leaders was absorbed into the government.

As earlier observed, the post-transition period in South Africa saw the introduction of more stringent reporting requirements into grant-making to South African nonprofit organisations. While this encouraged greater accountability within the sector, it was difficult for many organisations, which had become used to loose 'struggle accounting' to adjust.¹⁴¹ Analysing the funding shifts, Smith cites research findings which showed that although there had been a sharp decline in funding to the sector from foreign government and multilateral sources in 1994 and 1995, funding had subsequently normalized and even increased.¹⁴²

Nevertheless, while it lasted, the sudden withdrawal of funding by donors raised ethical questions because, without sufficient notice to partner

¹⁴⁰ Smith, op. cit. at 8.

¹⁴¹ Ibid. at 11.

¹⁴² International Development Organisation, Synthesis Report (2000): Development Co-operation Report II for South Africa, 1994-1999 cited in Smith, op. cit. at 9.

recipient organisations, funding cuts resulted in job losses as well as the loss of vital services to communities.¹⁴³ This crisis demonstrated the importance of funders involving their previous and current partners in negotiation processes to alter funding patterns in order to preserve the gains of knowledge, good relations and experience built up even before the post apartheid government took over.¹⁴⁴ Nonprofit organisations on the other hand, were criticised for a fragmented and unassertive response to funders, following changes in the funding environment, a situation that should have fostered co-operative rather than adversarial and competitive relationships within the sector.¹⁴⁵

Notwithstanding the contributory element from nonprofit organisations themselves, the restrictive conditions accompanying funding agreements were critical in defining the relationship between nonprofit organisations and their funders.¹⁴⁶ On the whole, it seems that one of the assumptions behind the redirection of donor funding to government was that some of this funding would find its way back to the nonprofit sector through government channels.¹⁴⁷ However, the administration of funds marked for the work of nonprofit organisations, such as lottery allocations and government contracts was characterised by bottlenecks, which were often interpreted in nonprofit circles as government hostility to nonprofit organisations.¹⁴⁸

Currently, the redirection of funding from government to nonprofit organisations is a reality. South African nonprofit organisations who receive funding from government, typically those engaged in direct service delivery find

¹⁴³ M. Kleinenberg, 'Donors and Non-Government Organisation Ethics: The Effect of the Sudden Withdrawal of Grants, and the Imposition of Donor Values on Fundraising Management' (Durban: Olive Organisation Development and Training, MULBERRY Series, 1994) p.9.

¹⁴⁴ Pieterse (1995a), *op. cit.* at 13.

¹⁴⁵ Smith, *op. cit.* at 18.

¹⁴⁶ Narsoo, *op. cit.* at 26.

¹⁴⁷ Smith, *op. cit.* at 7.

¹⁴⁸ *Ibid* at 15.

generally need to register with the Nonprofit Organisations Directorate, under the NPO Act as a precondition for eligibility for government funding.¹⁴⁹

For organisations who do not receive funding from government, funding withdrawal, especially from foreign funders continues to present a real threat to their activities and projects. The withdrawal of additional funding to 'loveLife' [sic], the joint NGO initiative on HIV prevention among adolescents, by its core funder, the *Global Fund to Fight Aids, Tuberculosis and Malaria* (Global Fund) was reported.¹⁵⁰ The issues around which the decision was taken to discontinue funding had, in part, to do with the impact of the programmes of the former, the delivery of measurable project goals as well as the accounting procedures. On the other hand, the nonprofit organisation in question described the challenges posed by late disbursement of funds as well as the devaluation of the US dollar which eroded the value of the grant.¹⁵¹

A finding of funding crisis occasioned by a transition to a democratically elected government has also been made in relation to Nigeria. The similarity in the experiences of the two countries in this respect has been expressed as follows:

*'In the case of post-apartheid South Africa for instance, the NGO community witnessed a significant reduction in funding support from traditional donors because many of these donors began to redirect funds towards supporting the government of Nelson Mandela. A similar trend has adversely affected the level of funding support for Nigerian NGOs'*¹⁵²

In Nigeria however, the fact that the institutions of democratic governance had to be rebuilt virtually from scratch also meant that the nonprofit sector retained a role of supplying technical and to some extent, ideological support for this task. Training programmes promoted and funded by the USAID for various arms of government drew tremendously from human resources in the civil

¹⁴⁹ See Appendix A, item (i).

¹⁵⁰ Story published under the caption 'Documents Contradict LoveLife' in *Mail & Guardian*, January 6 to 12, 2006, p.3.

¹⁵¹ Ibid.

¹⁵² Ibhawoh, op. cit. at 65.

society sector, a factor which served to stabilise the flow of funding to the sector.¹⁵³

Other kinds of challenges encountered by nonprofit organisations in their work have to do with accompanying conditions for grants. Policies from countries of funding agencies often preclude spending on political activities and lobbying. Considering that Nigeria's democracy is at a stage when human rights-centred legislation need to be lobbied into place and repressive military decrees and edicts need to be lobbied out, this is a constraining situation. Discrepancies between focal areas of funders and organisational focus as well as donor stipulations of time sometimes that nonprofit organisations have to adjust their focus in order to keep afloat.¹⁵⁴

Funding inconsistencies are no doubt a feature of nonprofit project experience in other jurisdictions, given the donor-dependence character of the sector. As seen from the following criticism of funding patterns in the United States, not even advanced democracies with virtually institutionalized nonprofit sectors are exempt.

*'Foundations overlook projects aimed at fostering the growth and replication of new initiatives, or they fail to support the grantee over an appropriately long time span. They rarely do the upfront research and the postevaluation needed to ascertain if their programs have been successful and have continued to thrive after the initial period of seed grant support.'*¹⁵⁵

Currently, attention is drawn to other sources of financing the nonprofit sector in South Africa by research that brings out complex and obscure patterns of giving among South Africans, contradicting the common perception of philanthropy as dominated by the wealthy. The study reveals how giving is informed and influenced by many different factors, including altruism, religious belief, membership of 'specific identity categories' such as family and informal

¹⁵³ See discussion on contemporary developments in the nonprofit sector in 3.3 supra.

¹⁵⁴ See Appendix C, item (ix).

¹⁵⁵ Porter and Kramer, op. cit. at 128.

networks.¹⁵⁶ This is a useful trend to monitor and explore, particularly in grassroots communities, with a view to influencing a redefinition of legal provisions for tax exemption and donor deductibility for the growth of internal donor sources. In the next section the discussion highlights ongoing developments in the human resource needs of the nonprofit sector.

5.4.3 Staffing

As earlier observed, with the new, political and funding environment in South Africa, came a greater emphasis by donors on accountability and evaluative processes. The lapses in project reporting and monitoring which foreign funders were willing to overlook during the apartheid era became paramount in grant-making requirements. This factor, as well as the new forms of engagement with the state, especially in particular service delivery roles, called for a more professionalised staff base, a need which was heightened by the recruitment of key activist leaders of nonprofit organisations into the government.¹⁵⁷

From the point of view of receiving organisations, new funding measures introduced complicated application, tendering and reporting processes which required particular management tools, such as the Logical Framework Analysis.¹⁵⁸ This meant that skills were required in these areas and the sector had therefore to compete with business and government for workers in the same human resource market. While the migration of nonprofit organisation leaders to other sectors has been described largely in problematic terms, by some authors, it has also been viewed in more dispassionate terms, on the reasoning that 'we are dealing with a professional labour market, where a fluid interchange of leaders between the nonprofit, public and private sectors is to be expected.'¹⁵⁹

¹⁵⁶ D. Everatt, A. Habib, B. Maharaj, A. Nyar, 'Patterns of Giving in South Africa' in *Voluntas*, (International of Voluntary and Nonprofit Organisations), Vol.16, Number 3, September 2005, p.275 at 279-80.

¹⁵⁷ See Chapter 4.2.2. *supra*.

¹⁵⁸ Smith, *op. cit.* at 8.

¹⁵⁹ *Ibid.* at 11.

The staffing problem was clearly reflected in nongovernmental development organisations whose mission had been primarily to contribute to the development and growth of grassroots social movements working to dismantle the apartheid state. In tune with the needs of that period, the criteria for recruiting staff were 'an intimate understanding of the community, a good activist and struggle track record, and a commitment to the values of the organisation', not the technical and professional skills that were subsequently called for.¹⁶⁰ Then, nonprofit sector practitioners had a commitment to a cause for which they were willing to forgo attractive salaries, whereas, post apartheid, salaries in this sector were improved in order to attract people with the necessary skills.¹⁶¹

The challenge of staff competencies post-transition was particularly highlighted by the policy vacuum created by the dissipation of hard-core apartheid governing institutions. As the political space opened up, more opportunities were created for civil society organisations to contribute to macro-policy issues for the development of a coherent, practical and viable alternative for governance. The inability of non-governmental development organisations, to deliver at this point, exposed the fact that demand was rapidly outstripping capacity, not just in terms of limited number of staff, but also as a result of limited skills base and technical competence.¹⁶²

The South African experience though better documented, is comparable to the Nigerian experience where the weaknesses and capacity limitations of member organisations of the Transition Monitoring Group came to light through the NGO partnership for the observation of the 1998-99 elections.¹⁶³ The human rights organisations in particular were found to be lacking in adequate numbers

¹⁶⁰ Pieterse (1995b), *op. cit.* at 20.

¹⁶¹ Kleinenberg, *op. cit.* at 5 and 6.

¹⁶² Pieterse (1995b), *loc. cit.*

¹⁶³ Iheme (Ed.), *op. cit.* at vii.

of professionals needed for the volume of work generated in the post-military rights environment.¹⁶⁴

The urgency of incorporating human resource development as an integral aspect of the existence of non-governmental development organisations was underscored by the realization that organisational changes, however innovative, still rest, for their success, on the attitude, approach and competencies of the people who staff, manage and direct the organisation.¹⁶⁵

Staffing structure is clearly not consistent across organisations within the nonprofit sector. Some have a more organisational form, having access to external donors and being staffed by full time professionals responsible for delivering specific services, while others simply struggle to survive.¹⁶⁶

Kaplan makes the point that it is important to recognize that the management of staff who are engaged in the facilitation of the development processes of others is very different from the management of staff whose task it is to produce a product, the former being a far more complex and intricate discipline.¹⁶⁷ It is of critical importance therefore, that staff are enabled to see and relate to the work of the organisation as a coherent whole. For this purpose, strategy formulation which recognizes and makes room for the 'ebb and flow' movement between conceptual thinking and analytical thinking is very important. Conceptual thinking which focuses on conceiving futuristic goals and analytical thinking which seeks to understand and address the present, together, make up the ideological hub, around which institutions of civil society are organised.¹⁶⁸

The importance of staffing in the nonprofit sector is reinforced in the observation that re-emergence of anti-apartheid civil society in the 1980s was attributed to the availability of resources, human and material, the latter from

¹⁶⁴ Ibhawoh, *op. cit.* at 30 – 31; see also earlier discussion on this in 3.3 *supra*.

¹⁶⁵ Pieterse (1995b), *op. cit.* at 21.

¹⁶⁶ *Ibid.* at 7.

¹⁶⁷ Kaplan, *op. cit.* at 17 and 22.

¹⁶⁸ *Ibid.*

foreign sources, the former from a pool of politically aware and mobilised students, graduates and political prisoners released in the early 1980s.¹⁶⁹

A unique component of social policy in South Africa is job creation. Consequently, in studies demonstrating the effectiveness of certain activities of nonprofit organisations, the number of jobs created features as a positive indicator.¹⁷⁰ The socio-economic goal exists in tension with the insistence of some employers, especially in the business sector that the protective provisions of employment legislation restrict their capacity to employ more staff. As one employer put it,

*'The problem is that there are so many obstacles put in our way as employers that one often feels like throwing in the towel. There are hundreds sitting on the side of the road looking for work, but if you employ them you open a can of worms for yourself. It is all very well having all these wonderful rules, regulations and perks, but if your have a third world country you cannot expect those rules to apply.'*¹⁷¹

This is mildly echoed by the observation that emerged from interviews with nonprofit organisation managers that the network of statutory provisions on employment makes it difficult to discipline erring employees.¹⁷² Besides statutory provisions, the professionalism of nonprofit organisations is evident in the recruiting, management and remuneration provisions and procedures of nonprofit organisations.¹⁷³

The demand for increasing professionalisation in both countries also reflects the trend in the nonprofit sector in the United States, described by a number of scholars of the US nonprofit sector. As Salamon observes, 'the growing need for professional approaches to social problems has made it necessary to go beyond voluntary effort.'¹⁷⁴ In the United States of America,

¹⁶⁹ Habib, op. cit. at 231.

¹⁷⁰ Motale and Husy, op. cit. at 71.

¹⁷¹ Letter to the Editor titled 'Silly Regulations for Businesses just Make Unemployment Worse' by Destroyed Employer', Fish Hoek in *Weekend Argus* 12th June, 2004, p.16.

¹⁷² See Appendix A, item (iii).

¹⁷³ See Appendix B, items (iii) and (iv).

¹⁷⁴ Salamon (1995), op. cit. at 47; Salamon (1999), op. cit. at 164-5.

basic employment policies are substantially regulated across sectors by law, and communicated within particular agencies by means of personnel policy manuals.¹⁷⁵ It is an indication of the level of development of employment relations in the nonprofit sector in the United States that models exist for preparing personnel manuals for nonprofit organisations.¹⁷⁶ Further, certain statutes provide minimum standards, which apply generally to all employment establishments, effectively limiting their latitude in formulating employment policies in these areas.¹⁷⁷ The employment environment in the US nonprofit sector created by legislation may constitute a useful point of reference on this subject.¹⁷⁸

5.4.4 General Trends

Other trends were identified in relation to the capacity of nonprofit sector organisations to deal with an assortment of emerging issues, such as new forms of political and criminal violence, trauma counseling, conflict resolution, child and women abuse and HIV/AIDS.¹⁷⁹ This gave rise to new types of nonprofit organisations such as the Institute of Justice and Reconciliation which was established in 2000 to address issues of 'sustainable reconciliation, transitional justice and democratic nation-building'.¹⁸⁰

In respect of governance-related activities, forms of international support to the nonprofit sector recommended post-transition were, among others, equipping civil society formations to fulfill multiple roles as commentators,

¹⁷⁵ Four nonprofit organisations visited in Baltimore, Maryland, USA all had comprehensive personnel policy manuals. These were the Maryland Association of Resources for Family and Youth, the Advocates for Children and Youth, the House of Ruth and the Family and Children's Services of Maryland, all visited between October and December 2003. See Okoye (2003) op. cit. at 25.

¹⁷⁶ See for example, The Management Center, *Best Practices: The Model Employee Handbook for California Nonprofits* (San Francisco: Jossey-Bass, 1998).

¹⁷⁷ These statutes include the Fair Labour Standards Act 1938 (As Amended), Family and Medical Leave Act 1993, Consolidated Omnibus Budget Reconciliation Act 1985.

¹⁷⁸ See D.G. Samuels and H. Pianko, *Nonprofit Compensation, Benefits, and Employment Law* (New York: John Wiley & Sons, Inc., 1998).

¹⁷⁹ Smith, op. cit. at 12.

¹⁸⁰ See the website of the Institute of Justice and Reconciliation, www.ijr.org.za.

partners, monitors and critics of government policies, a task which the then government of national unity could not be expected to perform.¹⁸¹ Capacity building for nonprofit organisations in terms of individual and organisational development was seen as imperative to the success of civil society in influencing or affecting the institutions of governance which it sought to transform.¹⁸²

In some quarters however, it was felt that concerns about changes in the nonprofit sector should not be with maintaining the status quo as much as with ensuring that the kinds of organisations within the sector and the roles they perform are appropriate to South Africa's current development needs.¹⁸³ This required an understanding of the ideological basis of social movements and their roles in a transitional society as failure to recognize the ideological vacuum resulted in the oversimplification of post-apartheid challenges as 'capacity limitations'.¹⁸⁴

Socio-economic changes have tended to bring about changes in the character of the nonprofit sector in other parts of the world. In the United States for instance, a process, described as a 'reinvigoration of the grass-roots base' unfolded with changes in the funding pattern of nonprofit organisations in the US in the 1980s, described as follows:

*'Responding to the twin challenges of federal budget cuts and economic recession in the early 1980s, a wide assortment of emergency feeding programs, temporary housing facilities, AIDS clinics, and self-help groups of various sorts popped up in communities across the land. As problems persisted, moreover, "emergency facilities evolved into congregate shelters, soup kitchens, and food banks, and ultimately into multiple-purpose organisations that didn't just feed the hungry and homeless people, but sought to identify their problems and do whatever was needed to move them back into the mainstream.'*¹⁸⁵

¹⁸¹ Pieterse (1995a) op. cit. at 14.

¹⁸² Kaplan, op. cit. at 13.

¹⁸³ Smith, op. cit. at 11.

¹⁸⁴ Pieterse (1995b), op. cit. at 1.

¹⁸⁵ Salamon (1999), op. cit. at 165-6.

It would be useful to continue to monitor the ways in which several forces continue to shape the nonprofit sector in South Africa, the major ones being international donors, the government and the nonprofit sector itself.¹⁸⁶ To these may be added the legal and policy environment for the work of organisations in the nonprofit sector, to which the present work has been largely devoted.

With respect to Nigeria, fieldwork reveals that some new agencies have emerged since the transition programme, which indicates a steady growth in the nonprofit sector in the late 1990s and early 2000s. These include the African Institute of Applied Economics in Enugu which was established in 2000, the Womens' Rights Advancement Protection Alternative established in 1999 and the Centre for Women Studies. A current trend, among funding agencies, is to encourage the formation of networks of development organisations for specific programmes, with each institutional network member carrying on the same project in a different area. This strategy is seen as a way of avoiding duplication of efforts, improving impact and promoting accountability. The United Kingdom Department of International Development (DFID) in Nigeria works with a number of such networks under its 'Access to Justice' and HIV/AIDS intervention programmes.¹⁸⁷

Evidence from the United States also shows that the nonprofit sector is constantly changing in its composition, and that new forms of association emerge even as others decline. For example, the decline in traditional mass-based forms of civic organisation such as trade unions and sporting leagues in the 1980s and 1990s did not occur in a vacuum, but was accompanied by a growth in other kinds of associations, ranging from the mass-based Association of Retired Persons and the National Organisation for Women to smaller-sized support groups like book and hobby clubs and self-help groups.¹⁸⁸

¹⁸⁶ Smith, op. cit. at 14.

¹⁸⁷ See Department for International Development (DFID) Enugu Office, Nigeria, Newsletter, March 2003.

¹⁸⁸ R. D. Putnam, 'Bowling Alone: America's Declining Social Capital' in *Journal of Democracy*, Vol. 6, No.1, January 1995. pp.70-2.

5.5 Conclusion

The research shows that direct legal intervention into the environment for the work of nonprofits has occurred more in South Africa than in Nigeria. Nevertheless, in both countries, law was actively and passively instrumental to the development of what exists today as the nonprofit sector.

In all, the trajectory of legal intervention in the rise and operation of nonprofit organisations seems more clearly defined in South Africa than in other countries featured in the study. This is largely due to the fact that the apartheid system of government was established and entrenched by means of law. The operation of the law had different effects on different sub-sectors of the nonprofit sector, with the welfare and social service sub-sector enjoying a fairly congenial relationship with the government and the civic-advocacy associations perceived as opponents of government and treated as such. Perhaps, the trade union movement was the civil society sub-sector that experienced the most intense incursion by state authorities through the agency of law.

Subsequently, the programme of transformation which came with post-apartheid governments in South Africa has had to be effected by law. This largely accounts for the rapid pace of law reform in South Africa in comparison with Nigeria, and indeed other countries within and outside Africa. More distinctions and parallels from the research are brought out in the concluding chapter of this work, which follows.

CHAPTER SIX

CONCLUSION

6.1 Introduction

This study research set out to identify the ways in which the law defines, interacts with and regulates the nonprofit sector. To tackle this task, a number of multidisciplinary theories on the origins of the nonprofit sector were examined. These were the political, sociological and economic theories on the subject. The common strains that emerged from the theories were that the factors of government incapacity or failure, diverse needs of heterogenous societies, formal expression of ties of commonality and civic engagement with the state were key factors responsible for the growth of the nonprofit sector.

Further, literature on theories of law in development were reviewed. These highlighted the ways in which law hinders or facilitates development processes, depending on how it is applied. In this context, modern theories of alternative development were unequivocal in advocating decentralised development, and an increased role for nonprofit organisations in the delivery of development projects and services.¹

In chapters three and four, dedicated to Nigeria and South Africa respectively, the factors responsible for the growth of the contemporary nonprofit sector in these two countries were identified. This presented a test to the theorisation on the nonprofit sector and the role of law in development. To present a close-up picture of legal administration of the nonprofit sector in both countries, empirical research was conducted with civic-advocacy organisations in Nigeria and South Africa. This generated information on the operation of nonprofit organisations in both countries. Findings from both countries reflected similarities and differences which were reported in Chapter Five.

¹ See 2.4.1 and 2.4.2 supra.

In this chapter, the aim is to describe the contribution of this research to the body of knowledge in the broad fields of law in development and the specific and emerging field of nonprofit sector law. This is done by linking up the theorisation on the subject in the general literature with findings from the doctrinal and empirical research on the country case studies.

6.2 Linkages between Theories and Findings on Factors for the Growth of the Nonprofit Sector

A large part of the theoretical discourse on the origins of the nonprofit sector was done in the context of advanced western political economies, as appears from the recap of the theory which follows in 6.2.1. This made it necessary to place the discourse in the context of law in development, as summarised in 6.2.2. Parallels identified in the experience of the country case studies are discussed within this multidisciplinary theoretical framework in 6.2.3. These links are brought out in this section as conclusions from the research.

6.2.1 Summary of Theories From Nonprofit Sector Studies

The political theories take off from the point that the nonprofit sector is the crystallisation of the freedom to form voluntary organisations to serve a public purpose characteristic of democracies, and indicative of the state of a democratic society.² Another political factor is that the combination of state provision of public services with voluntary provision makes it possible to accommodate the views and preferences of a greater range of the community than would be accommodated if state provision alone were available. This diversity factor features significantly in the economic approach to nonprofit sector studies.³

Economic theories of the nonprofit sector describe the services which organisations in the nonprofit sector provide as 'public goods'. Essentially, the economic approach is directed at determining which of these public goods

² Douglas, op. cit. at 45.

will be produced by the nonprofit sector as distinct from government and business sectors and attempt to explain why.⁴ In other words, social service provision is viewed as an industry in which the public sector, the private business sector and the nonprofit sector all participate to differing degrees.

Sociological theorists describe the nonprofit sector as a buffer zone between the state and civil society, which mitigates social tensions and political conflicts and also serve as policy-formulating and consulting institutions for political bodies'.⁵ The sociological approach also tries to show how the origins of nonprofit organisations affect their relationship with the state.

Thus, while economic theories have dealt with the macro-economic analyses of demand and supply of services supplied by the nonprofit sector, political science approaches have described the macro-political functions of the sector and sociological theorizations have highlighted the service provision role of nonprofit organisations.

Another rationale for nonprofit organisations is that they are also often established, not by individual entrepreneurs, but by religious or other ideologically motivated organisations, through the provision of services such as education, health and other vital social services, with a view to maximising adherents rather than profits.⁶ In relation to African countries, significant economic developments such as the departure from large-scale centralised forms of planning carved out new roles for nonprofit organisations. This led to the rechanneling of development finance to voluntary organisations.⁷

Another factor that has given momentum to the growth of the nonprofit sector generally is the perception that they are better placed than government to reach the poor and disadvantaged. While this perception may be larger than the reality, it has influenced the establishing of nongovernmental development organisations, especially in Africa where

³ Salamon (1999), op. cit. at 12.

⁴ James, op. cit. at 21.

⁵ Seibel and Anheier, op. cit. at 16.

⁶ James, op. cit. at 23.

⁷ Anheier, op. cit. 362-3.

government delivery of social services has for the most part been on the decline. It is also of interest that quite often, nonprofit organisations benefit local communities in indirect and incidental ways, such as the creation of employment and the generation of commercial activity, as much as through direct project results⁸

6.2.2 Conclusions on Growth Factors

The characteristics common to the nonprofit sector of both countries were identified in Chapter 5, starting with the failure of government, by commission and omission, to deliver political and socio-economic entitlements to the majority of the population. This led to the struggle for the realisation of these rights, thus giving prominence to the human rights-cum-civic-advocacy agency.⁹ Other features shared by the nonprofit sector in both countries were the dependence of nonprofit organisations on external donor funding and the influence of international fiscal policy.¹⁰

Findings reflecting differences between the two countries were also made, starting with the timing of trade union involvement in rights struggles, which, in Nigeria, occurred post-independence, but preceded independence in South Africa. Another point of divergence was the core issue around which civil society was organised in both countries, namely state segregation policy in South Africa, and military rule in Nigeria. The transition to new rallying points, notably poverty alleviation in South African and consolidation of institutions of democracy in Nigeria also emerged as a point of difference.

The links that emerged from the country case studies are described in relation to the earlier mentioned categories of government failure, the heterogeneity factor, ties of commonality and civic engagement.

⁸ Ibid. at 364-5.

⁹ See discussions in 3.2.1 and 4.2.1 *supra*.

¹⁰ See 5.4.2 *supra*; see also Appendix A, item (viii) and Appendix C item (ix).

a. Government Failure

In the Nigerian experience, a clear departure from the welfare of the governed was established during the long period of military rule from 1966 to 1999, with a brief four-year period of civilian rule from 1980 to 1983.¹¹ The lack of positive political will and direction were characteristic of military governance. Incapacity for social delivery was a by-product of the focus of military rulers on power consolidation and the control of the centre.¹² Civil society activity took on two key forms in response to this state of affairs. First was the growth in the number of organisations devoted to the creation of civic awareness and democracy campaigns. Secondly, this situation fostered the springing up of self-help associations providing support networks to individuals and communities for survival needs.

In the case of South Africa, a two-pronged dimension to the government failure was evident. On the one hand, the pre-transition state was not equally inclusive of the population in policy and practice. Therefore, while one side of the same governance process may have demonstrated government failure in delivering civil and political rights to huge sections of the population, the other side of the coin presented a welfare-centred nonprofit sector whose growth was fuelled by different factors to serve different purposes.¹³ The South African experience reflects the dual character of its political economy.

b. Diverse Needs of Heterogenous Societies

While the theorisation on heterogeneity seemed to focus around differences in demands in social and recreational services in western societies, it was obvious, applying this theory in the law and development context, that differentiated needs exist even within a single sub-sector of the nonprofit sector. For instance, in relation to the civic-advocacy field of nonprofit activity, the needs of grassroots associations is usually that of information on the provisions of the law in relation to constitutional and other legal rights

¹¹ Welch (1995), op. cit. at 21-2.

¹² See Fayemi op. cit. at 124 -126; see also discussion on government failure in 3.2.1.

¹³ See discussion in 4.2.1 *supra*.

ensuring to them.¹⁴ An informed grassroots association was better positioned to determine and adopt the form of organisation suited to the articulation and representation of individual and communal needs.

On the other hand, an informed section of the society which possesses the capacity to appreciate and act on its rights would require the direct services of public interest law professionals. What determines whether such individuals or groups of persons will opt for the private legal firm or a nonprofit human rights organisation, or indeed a government ombudsman, include factors of service costs, perceptions of efficiency and the level of belief in or attachment to values-driven delivery, typically supplied by the nonprofit organisation. The issues of lower costs in government provision of public goods and increased control with substantial costs in private provision may result in the resort to an alternative collective form of provision of public goods through the nonprofit sector, as postulated by economic theorists.¹⁵

The differentiated demand, as described above, was reflected in the literature on the growth of the nonprofit sector in Nigeria and South Africa, as well as in the services provided by the nonprofit organisations interviewed in the two countries.¹⁶ While the needs of the informed public were met usually through direct action such as litigation, the needs of grassroots communities were addressed through civic education and programmes directed at empowering people to make informed decisions on their wellbeing.¹⁷

c. Ties of Commonality

The route followed by the discussion on the factors responsible for the growth of the nonprofit sector using the civic-advocacy organisation did not allow for any detailed look at other types of nonprofit associations, such as membership associations, usually formed around ties of commonality. This category is however clearly identified as business and professional

¹⁴ See discussion in 2.5 *supra*.

¹⁵ See discussion of economic theory in 2.2.2 *supra*.

¹⁶ See 3.2 and 4.2 *supra*. See also Appendix A, item (i), Appendix B, item (i), Appendix D, item (i).

¹⁷ See Appendix item (i) and Appendix C, item (i).

associations in the Swilling and Russell research, accounting for one per cent of employment in the South African nonprofit sector.¹⁸

d. Civic Engagement

The account of the growth of the nonprofit sector in Nigeria, as earlier observed, centred on the civic advocacy organisation as a popular type of nonprofit organisation, thus resonating with the ethos of civic engagement with the state as the *raison d'être* for the rise in nonprofit associations. Similarly the examination of three phases of civil society activity in South Africa showed how the nonprofit form of association grows rapidly around movements centering on ideological and rights issues. A current example of this is the springing up of new movements such as the Movement for Restoration and Defence of Democracy in Nigeria, directed against the alleged intent of the ruling party to seek constitutional amendment to allow for a three-term presidential tenure.¹⁹ In South Africa, reference has been made to the 'debate between social movements in the poorest urban centres over water cut-offs, levels of service and privatisation.'²⁰

e. Other Growth Factors

A finding not clearly captured by the literature is that the expansion of parameters for measuring development beyond traditional economic indices of per capita income meant an investment of time and effort in the development of personal capacity for self development by inducing and managing change. Related to this was the dynamics of socio-economic policies in the international sphere, which prompted research and intervention efforts into the effects of such policies on developing countries and communities. These efforts were undertaken through nonprofit research and development organisations. In South Africa, it was also useful to show,

¹⁸ See Appendix H.

¹⁹ See article titled, 'PDP: We've no Hand in Third Term' published in *This Day* (Nigerian newspaper) of 24/1/2006, accessed at <http://www.thisdayonline.com/nview.php?id=38948> on 26/1/2006.

²⁰ D. Hemson and K. Owusu-Ampomah, 'A Better Life for All? Service Delivery and Poverty Alleviation' in J. Daniel, R. Southall and J. Lutchman (Eds.), *State of the Nation: South Africa 2004-2005* (Cape Town: Human Sciences Research Council, 2005).

for purposes of government sponsorship, that jobs were being created through efforts to address social problems.

6.3 Conclusions on the Legal Environment for the Nonprofit Sector

The discourse on the interrelationship between law and development sought to show how law can be used to advance development objectives, and in turn, how development affects the evolution and application of law. Just as some legal provisions narrow the space for activities of civil society, others which create rights of participation and define ways of exercising them widen it. This potential of law for enhancing development on one hand, and perpetuating underdevelopment on the other, has led to the adoption of the human development approach by the United Nation in place of the economic development paradigm, thus promoting the capacity of law to advance human development.²¹

The human development approach extends beyond economic productivity to include indices of equity, sustainability and empowerment, thereby giving a more comprehensive direction to the use and application of law in development processes. In this regard, alternative development theories note three ways in which law impacts on development processes, firstly, through regulatory framework for development programmes, secondly, through the creation and protection of rights of participation and thirdly, through the creation of a conducive environment for facilitating organisational forms of association.²² This research was constituted around the second and third approaches.

The basic needs approach, on the other hand, recognises the right of people both to seek and to provide resources to satisfy basic needs. It is within this context that associations tend to emerge and carry on activities for purposes other than profit.²³

²¹ See discussion in 2.5 *supra*.

²² See 2.4.1 *supra*.

²³ See 2.4.2 *supra*.

A central point of intersection of law with the nonprofit sector within the development context therefore is in respect of legal capacity required for development activity. Since non-state associations are seen as better positioned to provide resources needed by grassroots groups, there is a need for them to be adequately equipped for this role through an enabling legal environment. However, it is acknowledged that any regulation of the nonprofit sector must be done with care, to avoid going against fundamental freedoms such as the right of association.²⁴

With respect to employment in the nonprofit sector, it is instructive that a number of characteristics associated with the informal sector are also widespread in the nonprofit sector. These are in a sense, more easily described in terms of the absence of certain elements of formal employment such as 'security and regularity of work, better earnings, existence of non-wage and long-term benefits, protective legislation and union protection.'²⁵ It is in the light of the foregoing observations that conclusions and recommendations are made in the concluding sections of this work.

6.3.1 Conclusions: South Africa

The environment created by the fundraising laws and the limited scope of tax exemption for nonprofits during the apartheid years was not very facilitating to organisations perceived to be in opposition. The changes brought about by the transition of the early 1990s opened up the legal environment for nonprofit organisations and called for adjustments in the programmes of associations of civil society. Legal and policy reform were pursued to effect the desired changes to the funding environment for the sector. In many ways, changes in the legal framework were a reflection of the use of law in the process of transformation in South African society. In this regard, law was not only about transformation, but also about weathering the challenges of the post-apartheid funding climate.

²⁴ See generally discussion in 2.5 and 2.6 respectively.

²⁵ R. Devey, C. Skinner and I. Valodia, *The State of the Informal Economy* in S. Buhlungu et al (Eds.), op. cit. at 227.

For South African civil society, the process of creating the Nonprofit Organisations Act 1997 was a lesson in government civil-society partnership. A lesson that emerged clearly from that process was that the non-inclusion of government from the process at the onset turned out to delay the process, as some organisations did not wish to participate in a process that seemed to be led by a particular organisation. The presence of government earlier might have injected a neutral element, necessary for the progress of the initiative. As it turned out, this omission seemed instead to have prolonged the process. The feeling was captured by one of the leading actors in that process as follows:

*'The organisations leading the process did not sufficiently think through all possible strategies for engaging government. In fact our constructive relationship with government was as a result of government approaching us and indicating their willingness to participate and be partners in the enabling environment process.... With the benefit of hindsight it would have been better for us to approach the Welfare Department early in 1994. This would have allowed us to recognize that there was a high level of commonality around values regarding the regulation of non-profit organisations This would have allowed government to lead the process of drafting legislation and bringing to the discussion organisations and people who may not have wanted to participate in a 'DRC led' initiative.'*²⁶

Nonetheless, that consultative process resulted in a more conducive legal framework for the work of organisations in the nonprofit sector in South Africa as well as eligibility for tax benefits for a larger category of organisations. Thus negative law provoked civil society reaction that produced positive law, which regulates institutions of civil society among other entities.

The Nonprofit Organisations Act 1997 introduced a measure of regulation into the sector while retaining the essential requirement of voluntariness in complying with its provisions. However, registration under the Act confers an advantageous status on nonprofit organisations as this enhances their credibility with funders. The reporting requirements prescribed by the Act make it easier for the track record of nonprofit organisations to be checked

²⁶ Dangor (1999b), op. cit. at 1.

out by prospective funders, thereby limiting the element of risk or luck in making and receiving grants respectively. This element of accountability is perceived as empowering for the sector and reassuring to funders. Further, the twin incentives of tax exemption and donor deductibility become accessible with registration under the NPO Act. In all, for the average urban-based nonprofit organisation, the optional registration with the Nonprofit Organisations Directorate under the NPO Act is virtually a *sine qua non* for maintaining credibility with funders.²⁷ For small organisations however, the administrative capacity which the NPO Act requirements call for may be lacking.²⁸

The scope of organisations that may qualify for tax exemption and donor deductibility is wider with the amendment to the Income Tax Act 1967, while the Labour Relations Act 1995 promotes organisational accountability to staff of nonprofit organisations as it serves to guide decisions on human resource management. It is also useful for promoting transformation at the workplace as well as staff and clients' development. Another statute perceived as specifically facilitating to the work of the nonprofit sector was the Lotteries Act 1997, which provides for the channelling of part of state lottery proceeds to nonprofit organisations.²⁹

In the course of the study, and particularly from the interviews, it was evident that nonprofit sector practitioners, clearly appreciate the capacity of the law to exert a positive influence on the nonprofit sector environment. Some of the areas in which it was felt that the law could be applied to facilitate the work of nonprofit organisations were in respect of intersectoral planning, budgeting and implementation, adequate resourcing, and standardisation in training for quality monitoring for direct service delivery organisations.³⁰

²⁷ See Appendix A, item (i); see also 4.6.1.

²⁸ All six organisations interviewed were relatively prominent ones, all registered under the NPO Act, but some were aware of the challenges faced by smaller organisations.

²⁹ See Appendix A, item (ii).

³⁰ See Appendix A, item (vi).

6.3.2 Conclusions: Nigeria

The fact that the contemporary nonprofit sector in Nigeria was forged in the challenging environment of military rule is perhaps responsible for the high level of awareness of the law as an instrument of rights promotion in the sector. In particular, the constitutional provision on freedom of association is clearly understood as fundamental to the existence of nonprofit organisations. Generally, the provisions of the Companies and Allied Matters Act 1990 (CAMA) in respect of nonprofit organisations are limited to the procedure for registration and do not have any accounting or reporting stipulations.³¹

Nonprofit sector practitioners favour this 'loose' provision, and feel that any further regulation of the nonprofit sector should come from within the sector itself, and that any power created by any law should be exercisable by a civil society body democratically constituted for that purpose by nonprofit organisations themselves. This is no doubt borne out of wariness around regulatory provisions for the sector.³²

A general presumption of tax exemption prevails among practitioners in the nonprofit sector. Each organisation seems able to locate their activities into one of the categories eligible for tax exemption, among these, organisations engaged in charitable, ecclesiastical, charitable or educational activities.³³ Issues of tax exemption seemed to have taken a back seat during the pro-democracy era of the 1990s, and since then, the discussion on tax issues seems to be by way of oral debates between tax officials and nonprofit organisation staff when visits are made to the latter by the former.

Staffing of nonprofit organisations, in particular, the civic-advocacy types is of a relatively high quality, and fairly established employment practices. However, the uncertainty of continued employment and the absence of withdrawal or retirement benefits are described by employees as unsatisfactory aspects of employment in the sector.³⁴ In consequence, the

³¹ The only information to be filed annually under s.690(1) CAMA are those showing the particulars of the trustees, changes in the constitution of the association and particulars of any property held by it.

³² See Appendix C, items (iii), (vi) and (vii).

³³ Companies Income Tax 1979, s.19(1); see earlier discussion on this in 3.6.4 and 5.3.3 supra.

³⁴ See Appendix D, items (iv).

need is felt by some employees for employees associations in the nonprofit sector.³⁵

Employment statutes in Nigeria apply to staff of nonprofit organisations more by default than by design. This is because employment law in Nigeria had its origins in the commercial and public service activities of the colonial government and this greatly influenced the character of employment law in Nigeria (Ananaba 1969; Dike 1986). Consequently, the bulk of labour legislation in Nigeria was not created with the nonprofit organisation in view, but rather with the public sector, the commercial and industrial sector.³⁶ Legal provisions specifically directed at the nonprofit sector are found in the Companies and Allied Matters Act 1990, and are almost exclusively directed at procedures for registration.³⁷ Within these limitations, employment in a nonprofit sector establishment in Nigeria, as in other sectors, is still governed by the contract of employment, the applicable statutes and the common law implied terms and conditions of employment.

Nevertheless, certain peculiar aspects of employment in the nonprofit sector in the context of a developing society remain unaddressed by legal provisions. For instance, the trans-national character of funding in this sector also means that sometimes certain laws or policies regulating the use of donated funds in the funding country affect the application of grant funds in the recipient country in ways which narrowly circumscribe what nonprofit organisations can do for their workers. An example is that grants to recipient nonprofit organisations in Nigeria do not usually accommodate the payment of benefits to workers beyond salaries, and this, in a work setup that is largely non-pensionable and a sector that is traditionally non-unionist.³⁸

On the whole, the case has been made for the importance of legislation that provides a framework for the work of nonprofit organisations on the

³⁵ Ibid, item (v).

³⁶ The key labour statutes on private sector employment include the Labour Act 1974, the Wages Boards and Industrial Councils Act 1973, the Trade Unions Act 1973, the Trade Disputes Act 1976, the Factories Act (re-enacted in 1987) and the Workmen's Compensation Act (re-enacted in 1987)

³⁷ Companies and Allied Matters Act 1990, C20, Laws of the Federation of Nigeria 2004, Part C.

³⁸ See Appendix D, item (iv).

rationale that framework legislation will make legal provisions more accessible, avoid unequal treatment of similar organisations under different laws and minimise the cost of legal expertise required by grassroots organisations to unravel the multiplicity of laws.³⁹ It is submitted that a framework legislation will be useful and even if not all nonprofit organisations are covered, at least those not covered will be in the minority, or at worst, it will be a case of judicially determining whether a nonprofit organisation is covered or not.

6.4 Recommendations

The law is perceived as useful to regulate nonprofit sector activity, but the essential thing is voluntariness in registration, as compulsion imposes additional burdens on nonprofit organisations who use valuable time meant for their organisational mission for administrative duties, while other legal provisions serve to correct breaches.

6.4.1 Recommendations on South Africa

While the Nonprofit Organisations Act 1997 (NPO Act) has introduced a measure of desirable recognition and leverage to the sector, it is submitted that there are some improvements that could be made to the regulatory environment which it creates for the nonprofit sector. First, it is important for the Act to reflect the reality of various types and forms of nonprofit organisations. At present, the treatment of NPOs in the Act seems to work on an assumption of homogeneity in their character. It will be useful to adopt the drafting style recommended by Ferraro in his 'framework legislation' model, where different kinds of organisations are defined and then provided for, in different parts of the same statute.⁴⁰

Secondly, there is a need to create a help system for small organisations to enable them carry out the registration requirements of the NPO Act if they so desire, and thereby, draw the benefits of the 'NPO Act - compliant' status.

³⁹ See 2.5 supra.

Multiple legal requirements stretch the administrative capacity of nonprofit organisations, and small organisations are particularly challenged in this respect. The situation is further compounded by the reluctance of funders to fund administrative costs.⁴¹

Thirdly, and more specifically to address the problem described above, special policy provisions may be adopted by the Directorate of Nonprofit Organisations to support small organisations and grassroots organisations with a proven record of public benefit work, but which may not have registered with the Nonprofit Organisations Directorate for reasons of capacity. Such organisations may be granted an exemption from the registration requirement of the NPO Act and allowed access to certain benefits that would not accrue to them otherwise. Further, a special facility may be set up under the Directorate to render the technical assistance for registration free of charge to such organisations. Further, the nonprofit sector itself can set up a co-ordinating body to help organisations in meeting registration requirements and public regulations.⁴²

Fourthly, it is submitted that a decentralisation of the registration process under the NPO Act is desirable to speed up the registration process for organisations. The current system where all applications are sent to Directorate of Nonprofit Organisations in Pretoria results in long delays which can work against access to funding and other resources for organisations seeking to get registered.⁴³

A fifth recommendation is articulated around the need to streamline legal requirements so that nonprofit organisations are not burdened with a duplication of requirements. For instance the NPO Act requirement of a narrative report now has a corresponding requirement for the submission of an organisational information manual under section 51 of the Promotion of

⁴⁰ Ferraro, op. cit. at 28.

⁴¹ See Appendix A, item (viii).

⁴² This last point was made in *Towards An Enabling Legal Environment for Civil Society*, Statement of the Sixteenth Annual Johns Hopkins International Fellows in Philanthropy Conference, Nairobi, Kenya, July 4-8, 2004, p.9, accessed at <http://www.jhu.edu/%7Ephilfellow/Kenya.pdf> on 28/1/2006.

⁴³ Appendix A, item (xi).

Access to Information Act 2000 (PAIA). It is felt by nonprofit sector practitioners that the latter requirement is covered by the former, and consequently that the manual submission requirement should either be waived for nonprofit organisations, or else such a manual should be submitted at the same time a nonprofit organisation applies to be registered under the NPO Act, so that the requirements are met in a single process.⁴⁴ It may be observed however, that the distinction between the two requirements is that while registration under the NPO Act is voluntary and so the reporting requirement applies only where an organisation is registered, the PAIA requirement for the submission of a manual is compulsory. So, while on the one hand, the PAIA facilitates the work of nonprofit organisations by making information held by public bodies more accessible, on the other hand, it imposes a corresponding requirement on private bodies, including nonprofit organisations.

A sixth recommendation, which reinforces existing opinion, is for a further expansion of the scope of eligibility for tax benefits in relation to nonprofit organisations. Although significant progress was recorded by the tax reforms of 2000, the scope of organisations eligible for tax benefits is still circumscribed by a number of factors. For one, the absence of an omnibus phrase in the description of activities which qualify as 'public benefit activity' gives it a closed meaning. Secondly the drafting style that provides for tax exemption by reference to an organisation's activities instead of the purposes for which it carries out those activities, operates to exclude many nonprofit organisations.⁴⁵

Other recommendations around tax framework reform for nonprofit organisations include the increase of tax deductible donations to a range of twenty to fifty per cent of individual income, the application of tax concession

⁴⁴ Appendix A, item (iii).

⁴⁵ Wyngaard and Dlamini, *op. cit.* make these two points at pp. 9 and 10 under the heading: '4.1: Criteria for Income Tax Exemption of NPOs'.

both to monetary and property gifts and the extension of varying degrees of tax exemption to all forms of public benefit nonprofit organisations.⁴⁶

Research into the nonprofit sector in South Africa is certainly at a more advanced stage than in Nigeria. Since the Nonprofit Organisations Act is in place, it would be of great benefit to the sector to direct research efforts towards ascertaining more specific demographics, by advancing sub-sectoral research in the nonprofit sector. This, it is expected, will yield useful information for the work of NPOs and for any future amendment to the Nonprofit Organisations Act to better serve the needs of nonprofit organisations. This recommendation echoes an earlier call for sub-sectoral study made in relation to the nonprofit sector in the United States, as follows:

*'We need to know if workers in one nonprofit activity are distinct from workers in other nonprofit activities. We need to know if workers in a nonprofit activity are distinct from workers in a similar for profit activity. Do they differ with respect to gender, age, educational attainment, occupation, full-time employment, part-time employment, and so on....'*⁴⁷

With regard to funding, the funding shifts experienced during the transition years is a demonstration of how easily a nonprofit organisation's activities can be destabilised with changes in funding. This experience establishes the case for a growth of local funding sources which are responsive to the needs of the nonprofit sector in South Africa. In this regard, diverse patterns of giving which have been identified within South Africa are recommended for exploration. These include individual, corporate, family, communal and traditional forms of giving.⁴⁸

Next, the recent exchanges between the South African government and nonprofit sector practitioners, 'provoked' by President Mbeki's charge of manipulation of nongovernmental organisations by their foreign donors indicate that the nonprofit sector in South Africa has alighted on another era,

⁴⁶ *Towards An Enabling Legal Environment for Civil Society*, op. cit. at 5-6.

⁴⁷ Rudney, op. cit. at 197.

⁴⁸ Everratt et al, op. cit. discuss this in detail.

requiring paradigm shifts and 'revised' skills of engagement.⁴⁹ The exchange was triggered off by the push for increased participation by civil society in the NEPAD peer review mechanism on South Africa.⁵⁰ Sporadic rejoinders to executive speculations are also indicators that new forms of communication need to be explored and cultivated. Indeed as observed in one of the responses, this important debate is 'something that both government and NGOs need to constantly reflect upon.'⁵¹

It is submitted that a law, such as the Nonprofit Organisations Act does not necessarily answer this need. Rather, it may be more relevant at this stage, for the nonprofit sector to pursue a Compact with the government. A Compact, in this sense is relevant not just for the sake of having one, but as a means of opening up fresh avenues of communication between the two sectors, and leading to agreements on expectations and means of dialogue and partnership between the two sectors. Issues concluded in a Compact would usually have the flexibility characteristic of soft law, and while not rigidly binding, sets out something of an 'ideological' framework around which future issues are to be discussed. Thus while addressing present issues, the Compact also anticipates future developments, since the nonprofit sector is a permanent feature of private associational life as well as a dynamic sphere of public engagement. In taking this initiative, the nonprofit sector shows that it recognises that:

*'Institutions that elect to operate around this political field as agents of representational democracy must seek to reach out because they are not only pressure groups in that classical sense, they are surrogate parliaments in themselves having sought no mandate, because the mandate is a concluded constitutional agenda, and canvassing to speak for the people in a strictly juristic sense.'*⁵² – emphasis added.

⁴⁹ SABC Radio audiotape of the programme 'After 8 Debate' of 4/10/2005, titled 'N.G.O.s', featuring a public debate on the merits of the President's concerns and generally around the subject of the relevance of some nonprofit organisations.

⁵⁰ Ibid.

⁵¹ T. Smith, I. Davids and G. Holland of the Foundation for Contemporary Research, Cape Town, 'NGOs no Puppets on Donor String' in *Siar* (South African newspaper) 26 October, 2005, p.18.

⁵² Olorunyomi, op. cit. at 130.

It may also be necessary for the co-ordination of funding efforts and for adoption of minimum principles of funding for funding agencies represented in South Africa to have a loose partnership similar to that maintained by the Council on Foundations (COF) in Washington, USA. The COF provides leadership expertise, legal services and networking opportunities to its members, consisting of over two thousand grantmakers, including foundations, corporate giving programmes and other donor institutions.⁵³ While many donors to South Africa nonprofit organisations are international and may already belong to the COF or a similar body, it is submitted that a localised 'donors circle' will be better positioned to appreciate the country-specific issues and contexts within which much of nonprofit activity is carried out. Such a body can intervene in funding disputes and promote continuity of beneficial programmes of nonprofit organisations when they are jeopardised as a result of funding cuts.⁵⁴

In respect of employment in the nonprofit sector, it is submitted that while the element of uncertainty may not be eliminated, efforts can be made to address the twin concerns of uncertainty of continued employment and terminal benefits expressed by employees in the sector.⁵⁵ Consequently, it is recommended that a fund be established for nonprofit sector employees to provide a cushioning allowance for transition periods for nonprofit staff who lose their jobs as a result of funding shortage. It would be necessary to specify criteria for eligibility to the benefit of such a fund. Financing for this fund could be a joint project between government and funders, with a minimal contribution from nonprofit sector employees.

The rationale for the above recommendation is that while employees in other sectors may be entitled to severance packages in the event of job loss, those in the nonprofit sector usually have no such entitlement. This measure should however, be preceded by dedicated research into nonprofit sector

⁵³ See www.cof.org, accessed on 11/1/2006.

⁵⁴ The withdrawal of funding by the Global Fund from the nonprofit, LoveLife is a recent case in point. Story published under the caption 'Documents Contradict LoveLife' in *Mail & Guardian*, January 6 to 12, 2006, p.3. See the issues raised in 5.4.2 *supra*.

⁵⁵ See Appendix B, item (v).

employment with a view to establishing similarities and determining divergences between employment in other sectors and that in the nonprofit sector.

In terms of employment, it is submitted that since the nonprofit sector is increasingly a major employer, it is imperative that cross-disciplinary research is carried out into the phenomenon of the 'not-for-profit employer'. The need for multidisciplinary research is acknowledged in the following observation:

*'We use a civil society approach to look at the role of nonprofits in generating the social capital that links people to their communities and to others.... We use an economic perspective to look at the creation of income, jobs and knowledge, as well as service provision and economic development... We employ a religious perspective to look at the role of nonprofits in alleviating poverty and promoting and maintaining religious values and beliefs.'*⁵⁶

On a general note, and although this work is not a comparison of the nonprofit sector with the business or 'for-profit' sector, it is worth mentioning that in setting out such things as codes of conduct expected of corporate entities, it may still be found that the nonprofit sector is not primarily considered. This is the case, for instance with the King 1 and King 2 Reports on Corporate Governance which set out a code of corporate conduct for corporate bodies in South Africa.⁵⁷ It does happen however that these Reports tend to influence expectations of organisational entities generally, irrespective of whether they are business enterprises or nonprofit entities. It is submitted that a Compact such as that described earlier may be concluded in a way that deals with this omission, thus serving a corresponding purpose for the nonprofit sector, that the King Reports serve for the corporate business sector.

⁵⁶ Boris, *op. cit.* at 17-18.

6.4.2 Recommendations on Nigeria

There is first a need for clarity in the legal framework for the setting up of nonprofit associations in Nigeria. As earlier mentioned, a significant attempt has been made to assemble the laws applicable to various kinds of nonprofit associations.⁵⁸ However, the recognition of these organisations as a distinct sector of operation, requiring some dedicated attention is yet to be done. It is therefore recommended that an enabling law for the nonprofit sector in Nigeria, modelled after the South African Nonprofit Organisations Act 1997 (NPO Act) be enacted. As with the NPO Act, registration under this Act should be voluntary, so as to preserve the rights of people to associate freely, and maintain the spirit of the law in relation to associational life, expressed as follows:

*'Nor should legislation curtail the activities of NPOs or constrain and hamper them on the assumption that they will violate the law. The law should operate only after it has been broken or after the NPO has failed to account in accordance with the laid down procedures.'*⁵⁹

A follow-up recommendation is that the effort to produce such a law should be initiated and led by practitioners in the nonprofit sector. As reported earlier, some attempts to introduce a bill for the regulation of non-governmental organisations in Nigeria were scuttled, either because of a lack of involvement of nonprofit sector practitioners in the process of determining the contents of the bill, or because the draft bill did not reflect decisions arising out of such consultations.⁶⁰ This has led to some scepticism about the need for a law or other government institution to register nonprofit organisations, especially in view of the free association ethos of civil society initiatives as well as the existing powers of the Corporate Affairs Commission to register and regulate all entities registered under the Companies and Allied

⁵⁷ See King I Report on Corporate Governance 1994 and King II Report on Corporate Governance 2002, accessed at the website of the Institute of Directors in Southern Africa, www.iodsa.co.za on 24/1/2006. See also Appendix A, item (x).

⁵⁸ See Olowokure (1999) and (2000), op. cit., cited extensively in 3.4 supra.

⁵⁹ Dangor et al, *The Non-Profit Sector in South Africa*, op. cit. at 30.

⁶⁰ See article titled 'Law to Regulate NGOs Underway' in *Assembly Watch* (newsletter of the Constitutional Rights Project, Vol.2, No.12, May 2001) p.3.

Matters Act 1990 (CAMA).⁶¹ However, dedicated research into the legal environment for the nonprofit sector led to the conclusion that the Corporate Affairs Commission is over-extended by its administration of companies and business names registration and records, and cannot realistically be expected to administer legal provisions on nonprofit organisations adequately.⁶²

It then means that the need for a nonprofit-focused administrative is desirable, but this should be done through a carefully managed process involving all stakeholders and inclusive in perception as much as in reality. Moreover, provisions should be broadly couched, any procedures to be complied with must be simple and the requirements must be minimal and most importantly, and earlier observed, registration under any such law must be voluntary. It is submitted that these elements are already met in the South African legislation, and it is for this reason that it is recommended as a model for dedicated legislation on the Nigerian nonprofit sector.⁶³

It is further recommended that the legislative measure suggested above be preceded by research to determine the size, scope and structure of the nonprofit sector in Nigeria. Such a research can be structured to yield basic disaggregated demographic information. In this regard, it is important to learn from the South African experience in the enactment of the Nonprofit Organisations Act. A key critique of that Act was that it was made with very little knowledge of the sector.⁶⁴ Perhaps, if the countrywide research of the scale reported in *The Size and Scope of the Nonprofit Sector in South Africa*⁶⁵ had been conducted before the enactment of the NPO Act, provision may have been made for the peculiar limitations and challenges of capacity and skill faced by grassroots associations and other small organisations. Some attempts have been made in the past at sub sectoral levels to gather some data on the Nigerian nonprofit sector.⁶⁶ Although these efforts need to be

⁶¹ Ibid. at 2.

⁶² Olowokure (2000), op. cit. at 47.

⁶³ See discussion on the South African Nonprofit Organisations Act 1997 in 4.6.1 supra.

⁶⁴ Swilling and Russell, op. cit. at 5.

⁶⁵ See Appendix H; see also Swilling and Russell, op. cit.

⁶⁶ Some of these research efforts include O. Nwankwo (Ed.) *A Directory of Non Governmental Organisations in Eastern Nigeria* (Enugu: Civil Resource Development and Documentation Centre,

updated, the organisations involved can be drafted into a generic project of the kind recommended to enrich the process with their experience.

In view of the heterogeneity of nonprofit organisations, it would be useful in such a law, to make provisions for distinct types of nonprofit organisations.⁶⁷ These provisions would be accompanied by definitions of terminologies to indicate which parts of the statute apply to particular kinds of organisations. This is the drafting style originally applied in the arrangement of the Companies and Allied Matters Act 1990, which was divided into Parts A, B and C, dealing with companies, business names and incorporated trustees respectively.⁶⁸

A fourth recommendation is for the inclusion in the proposed law, of clear provisions on eligibility for tax exemption as well as the criteria for assessing tax deductible contributions, incorporating direct references to relevant sections of the tax laws.

Fifthly, and perhaps deserving of even higher priority than a legal framework, is the establishment of key infrastructure organisations within the nonprofit sector. Infrastructure organisations are described as organisations that serve the general needs of a group of organisations, 'providing basic support to a broader set of institutions much as the infrastructure of a building supports the rest of the building's structure.'⁶⁹ It is observed that 'Like organisations in the business and government sectors, nonprofit organisations can gain in strength and effectiveness from working with institutions that serve their common interests.'⁷⁰ Examples include the International Centre for Not-For-Profit Law (ICNL) in Washington DC and

2001); *Directory of Penal Reform NGOs in Nigeria* (Lagos: Centre for Law Enforcement Education, 1996); the membership list of the Coalition of the Nigerian Non Government Organisations on Health, Population and Development (CONNOHPD) (Lagos: CONNOPHD, 1997); and G. Ngeri-Nwagha (Ed.), *A Directory of NGOs in Nigeria* (Lagos: UNICEF, 1995).

⁶⁷ This coheres with the model suggested by Ferraro, op. cit. at 28. See also the discussion on the legal environment for the nonprofit sector in 2.6 supra.

⁶⁸ See Companies and Allied Matters Act 1990, now codified as C20, Laws of the Federation of Nigeria 2004.

⁶⁹ See *Building the Organisational Infrastructure of Civil Society*, Statement of the 14th Annual Johns Hopkins International Fellows in Philanthropy Conference, Istanbul, Turkey, July 1-3, 2003, p.1, footnote 1, accessed at <http://www.jhu.edu/%7Ephilfellow/Turkey.pdf> on 13/1/2006.

⁷⁰ Ibid.

Türk Üçüncü Sektör Vakfı (TUSEV), translated 'The Third Sector Foundation of Turkey', founded in 1993 by a conglomeration of twenty three foundations.⁷¹ The ICNL collaborated with TUSEV to organise a workshop, in August 2005, for NGO and government officials around developing a regulatory treatment of public benefit organisations as well as a framework for NGO-State co-operation, an initiative that will benefit the generality of nonprofit organisations.⁷² Some things considered were the definition of public benefit, the appropriate decision-making body for public benefit status, the application procedures as well as tax benefits available to public organisations and their donors.

Infrastructure organisations will be strategic to any generic research into the size of the nonprofit sector in Nigeria through the generation of statistics, the provision of useful information and the steering of pilot projects to facilitate such research.⁷³ Beyond the research agenda, infrastructure organisations, because of the composite character of their role in the nonprofit sector, may be in a position to inform the negotiation of a Compact between government and the nonprofit sector, as recommended for South Africa.⁷⁴

The nonprofit sector in Nigeria has entered into a new phase of existence, and will need to take a number of steps to institutionalise, that is, take its place as the third sector in the Nigerian political economy. Since military rule, the common 'enemy' that often disrupted the work of civil society organisations and other third sector organisations, has given way to civilian governance, opportunities exist to advance development programmes in different parts of the country and in various spheres of human activity within the nation. Subsequent recommendations have to do with human resource and employment issues on the nonprofit sector.

⁷¹ See www.icnl.org and www.tusev.org.tr respectively.

⁷² See <http://www.icnl.org/PRESS/Articles/2005/20050815.htm> accessed on 14/1/2006.

⁷³ The Development Information Network (DEVNET) in Lagos Nigeria (www.devnetnigeria.org) is oriented to this role. More of such infrastructural initiatives are required to service the large nonprofit sector in Nigeria.

⁷⁴ See recommendations on South Africa in 6.4.1 supra; South Africa already has well established infrastructure organisations such as the Nonprofit Partnership and the South African NGO Coalition although they may go by other descriptions and may need to fine-tune their infrastructural role.

The next recommendation is tailored as a response to the increasing trend of funders to work with networks of nonprofit organisations. This calls for a reorientation of nonprofit organisations away from independent projects delivery into partnering arrangements. For optimal utilisation of the synergy created by collaborative effort, staff of nonprofit organisations will need to be equipped with partnering skills and a mission orientation compatible with collaboration within subsectors of nonprofit activity.

Related to subsectoral collaboration is cross-sectoral collaboration, where organisations in the third sector partner with government to advance developmental activity. This calls for professional skills on the part of nonprofit sector staff who, in Nigeria, have been groomed in a culture of suspicion, or at best indifference, towards government. This notwithstanding, some third sector agencies in Nigeria are already engaged in partnerships with government as a way of advancing their agency objectives. For instance the Human Rights Law Service (HURILAWS), a human rights nonprofit agency based in Lagos, collaborated with the Lagos State Executive and Judiciary on a legal reform project in which a simplified High Court Rules book for civil trials was produced for the Lagos State Judiciary in 2003.⁷⁵ To consolidate the gains of this and other efforts, there needs to be ongoing specialised professional development for staff employed in civil society organisations and other nonprofit organisations.⁷⁶ Some infrastructure-type organisations have emerged to take on this challenge. The Development Information Network (DEVNET) is one such organisation which seeks to facilitate access to information for its member organisations, with the aim of enhancing the quality of the latter's work.

Another development which will require a specialised workforce in third sector organisations is the call for the refocusing of developmental activity by nonprofit agencies in rural areas – the 'grassroots'.⁷⁷ In a country

⁷⁵ See www.hurilaws.org

⁷⁶ In the case of HURILAWS, seven of its twelve staff are qualified attorneys with human rights training. See www.hurilaws.org, accessed on 20/1/2004.

⁷⁷ See for example, Ibhawoh, *op. cit.* at 18.

where more than sixty percent of the population are rural dwellers, it is imperative for far reaching and lasting development that the human development activities carried out by city-based nonprofits be extended to rural communities. Development activity in rural communities has the potentially symbiotic effect of yielding even more human resources to meet the field staff needs of nonprofit agencies with a grassroots focus. The potential of rural dwellers whose experiences are directly relevant to the efforts of third sector development organisations is yet to be significantly tapped.

On the side of the donors, it will be necessary for donor agencies to re-evaluate their grant making processes, adjusting them to changes in the developmental role of third sector organisations in Nigeria. For example, more funding support will be required for institution building, which will include the provision of benefit packages and other professional incentives that will promote staff retention, since all sectors of the economy draw from the same pool of labour. It must be observed however, that where cross-sectoral migration occurs from the nonprofit sector to government, such staff tend to bring into slow government processes the innovativeness and dynamism for which the nonprofit sector is known.

Further on donor adjustments, some flexibility will have to be introduced in the ways in which grant funds are applied without compromising on accountability. Evaluation tools which measure outcomes more than just procedural compliance with grant guidelines will have to be developed.

Finally, effective human resource management requires that every nonprofit agency should have a personnel manual which sets out policies, procedures and benefits applicable to employment relationships. This is standard practice in countries like the United States of America where nonprofit sector employment is well structured, and also in South Africa. In the Nigerian context, such a manual or handbook, would incorporate, as prescribed by a leading civil society practitioner, a clear definition of the organisational hierarchy; staff recruitment, appraisal, and advancement

provisions; disciplinary and employment termination procedures as well as generally applicable terms of employment negotiated between staff and management.⁷⁸

Finally, since nonprofit sector workers have complaints and are not happy with the absence of certain employment benefits such as retirement benefits, but on the other hand, do not entirely favour workers unions, it falls on law and policy to secure their needs, when an employee has put in a substantial period of time in that employment. In this regard, the Nigeria Social Insurance Trust Fund Act 1993 (NSITF Act) is the only law that provides a social assistance scheme for contingencies such as invalidity, sickness and death for all private sector workers, including nonprofit sector employees. Yet, only a minimal compliance with its provisions was found from the empirical research.⁷⁹

In the light of the above observation, it is recommended that compliance with the provisions of the NSITF Act 1993 be made a condition for tax exemption and other benefits to enure to nonprofit organisations.⁸⁰ This provision would also be incorporated in the nonprofit sector law earlier proposed. Currently, the provisions of the Act are mandatory for employers of five or more workers.⁸¹ It is however recommended that the provisions of the law be made applicable to every employer, or at the very least employers of two or more people, as this will then cover employees in many nonprofit organisations that have a staff strength of less than five.

Considering the size and diversity of the country and the various dimensions of its developmental needs, the proposals put forward in this paper are not considered to be comprehensive. Rather, they are only intended to highlight the ways in which nonprofit sector activities in Nigeria

⁷⁸ Oroh, *op. cit.* at 138.

⁷⁹ See Appendix E, item (v).

⁸⁰ Currently, section 10 of the Nigeria Social Insurance Trust Fund Act 1993 makes the provisions of the Act mandatory for employers of five or more workers, as mentioned in 3.7.6 *supra*.

⁸¹ Nigeria Social Insurance Trust Fund Act 1993, s.10; see also the discussion of the Act in 3.7.6(b) *supra*.

are changing and point out some steps that will need to be taken to outfit it for its expanding role as Nigeria's third sector.

6.5 Concluding Remarks

The law shapes the framework within which the nonprofit sector operates as much as it fashions the tools which the latter uses. In turn, the activities of nonprofit associations influence the content and operation of law directly and indirectly in various ways, including advocacy and lobbying, through collaborative projects with government, and by virtue of their nonprofit status.

The research reinforced the fact that enabling legal provisions on association support democratic processes by providing a facilitating environment for nonprofit forms of activity. Put differently, improving the legal capacity of non-state associations reinforces and protects the rights of people to pursue development. While this is so, it was further established that this fact also works in the breach where repressive laws have the effect of provoking resistance. The present legal provisions on association in both countries are generally conducive to the formation of nonprofit associations, but more specific provisions conferring additional tax advantages need to be pursued.

In relation to the work of nonprofit organisations specifically engaged in advocacy work, different laws combine to create a legal basis that lends weight to their advocacy work in various areas, while the organisations, in turn, contribute to the development of the body of laws in the area of their activities.

The examination of the legal environment was considered incomplete without a consideration of the human resource component of the nonprofit organisation and the relevant employment law. The role of the nonprofit organisation in development is often acknowledged, but the designation of these organisations as an employment bloc is one which is rarely made. An

attempt was made to draw out various aspects of employment in the nonprofit sector, as reported in Appendixes A to D.

It is hoped that this work has succeeded in highlighting the issues and challenges comprised in the legal environment in which the nonprofit agencies of civil society operate in Nigeria and South Africa. In both countries, future research may need to be carried out into the patterns of subsectoral activities within the sector, the growth of local sources of funding, the suitability of applicable employment law to the sector, and the tailoring of legal provisions to the needs of a nonprofit sector disaggregated by size and budget.

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APPENDIX A

South Africa: Managerial Interview Report

(i) Introduction

Managerial staff in six organisations were interviewed. The organisations were the Institute of Democracy in South Africa (IDASA), the Western Cape Network on Violence Against Women (WCNVAW), Institute of Justice and Reconciliation (IJR), Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN), National Institute for Crime Prevention and the Reintegration of Offenders (NCRO) and the Legal Resources Centre (LRC), all in Cape Town. Visits were paid to these organisations between June 2004 and December 2005. The questions used to draw out the information reported here are found in Appendix F, while a tabular presentation of a brief organisational profile is shown in Appendix L.

(ii) The Nonprofit Organisations Act 1997 (NPO Act)

Of the six organisations whose representatives were interviewed, five were registered under the Nonprofit Organisations Act 1997. This gives credibility with funders and in some ways, increases the bargaining strength of recipient nonprofit organisations with their funding partners. For organisations who receive government funding and other resources channeled through government, it is usually a prerequisite to be registered with the Directorate for Nonprofit Organisations under the NPO Act. Further, it confers eligibility for tax and levy exemptions as well as donor deductibility. The Act is perceived as fostering accountability and effectiveness within the nonprofit sector, with the requirement of an annual audit and filing of organisational reports, among other provisions. The NPO Act introduced some necessary regulation into the sector and also confers a status on registered organisations that is generally perceived as empowering. It also creates opportunities for grassroots organisations to gain exposure to new ways of doing things and access to an expanded resource base. It is however challenging for small organisations and grassroots groups to comply with its provisions as it introduces costs and administrative skills which small organisations may not possess the capacity to handle.

(iii) Awareness and Compliance with Legal Provisions

Different kinds of law intersect with the work carried out by different types of nonprofit organisations. Apart from the NPO Act, other legal provisions which have a more general application, and thus a higher level of awareness, are mainly found in tax law and employment law.

The current tax law, principally the Income Tax Act 1962¹ expands the scope for more nonprofit organisations to qualify for tax exemption and donor deductibility. The Labour Relations Act 1995 (LRA) and other employment statutes discussed in section 4.4 are perceived as promoting organisational accountability to staff, as it affords them the same legal protection as workers in other sectors. Further, employment law provisions promote organisational commitment to transformation, which requires deliberate effort in this direction on the part of the organisation. On a

¹ As amended by the Tax Laws Amendment Act 2000.

day-to-day basis, these statutes guide recruiting and human resource management decisions. It was however observed by one respondent that the tight protection provided by current South African employment law makes it difficult to terminate the services of erring staff.

Another relevant statute identified as essential for the work of nonprofit organisations include the Lotteries Act 1997² which provides funding for community based organisations. There were mixed feelings about the Promotion of Access to Information Act 2000 (PAIA). While the rationale of transparency and openness is acknowledged as important, it was felt that the Act introduces a major burden particularly on small organisations. In particular, it was felt that the requirement for the submission of a manual by each and every organisation is already covered by the provisions of the NPO Act requiring the submission of a constitution and periodic reports by registered organisations.³ With regard to its application to the nonprofit sector, the PAIA seems directed at capturing those organisations that have not registered under the NPO Act, a situation that could operate against the principle of associational life and voluntarism in civil society. Furthermore, in respect of the PAIA, those nonprofit organisations working in services requiring confidentiality observe the need to balance the provisions of the Act with the need to protect their clients, as for example in cases of child abuse.

Further, the Financial Intelligence Centre Act 2001 (FICA)⁴ requirement for documentary evidence of a physical address for bank clients' verification exercise is considered challenging for informal grassroots associations which typically have a loose modus operandi, and typically operate from unfixed locations. Not operating a bank account works limits the access of such organisations to funding.

(iv) Challenges of Legal Requirements on Administration

Generally, more legal requirements translate to more administrative work, which takes up time for the organisation's core work. Within the context of the low budget that most nonprofit organisations have to work with, this creates more work for staff, who often find that they have to play several different roles on one salary.

The gravity of the situation is worsened by the unwillingness of funders to support administrative costs, to the detriment of administrative capacity. It was further observed that the attempt to become compliant also exposed the incapacity of relevant government departments to deal with the processes involved. For instance, all applications for registration with the Directorate for Nonprofit Organisations are processed in Pretoria irrespective of where the organisation is located. This introduces long delays in the registration process. Further, organisations that maintain offices in other countries have the additional burden of complying with the laws of the host country.

It was however observed that while the different statutes impose bureaucratic requirements requiring more resources to comply with, the benefits outweigh the challenges of compliance. Lack of capacity, particularly among small organisations is

² Act 57 of 1997, s.26(3).

³ NPO Act 1997, ss.13 and 13(1). See discussion on this in 4.6.1 *supra*.

⁴ Act 38 of 2001, s.21.

however identified as a drawback to complying with and making use of legal provisions.

(v) Law and Organisational Mission

The role of the Constitution as the guiding authority for the promotion of socio-economic rights is clearly acknowledged.

Different laws combine to advance the advocacy work of nonprofit organisations working in different areas. For example, organisations involved in service delivery to children, youth and families find laws on domestic violence, child protection, social security useful. In turn, these nonprofit organisations contribute to the development of these laws by their involvement in consultations leading to the drafting of the laws, through lobbying at the parliamentary process and through submissions on policy issues, among others. Some of the organisations interviewed contributed to the composition of the Nonprofit Organisations Act 1997, the Domestic Violence Act 1998 and the Child Justice bill.

Also, in the peculiar context of a country undergoing political and social transition, transitional justice, sometimes rule-bending is expedient for the sake of political stability, as for instance occurred in the work of the Truth and Reconciliation Commission.

Certain other laws are incidental to the work of nonprofit organisations. For example, the law of contract regulates organisations' contractual activities, which in the case of some of the organisations interviewed, include production of publications, supply of materials and outsourcing of certain specialised services.

(vi) Views on the Role of Law generally in development processes

The law was generally considered relevant as it creates a regulatory framework for associations in the nonprofit sector to gain a corporate personality. Further, there was an appreciation of law in its fundamental sense, as the expression of equality, indispensable to human activity, with the potential to ensure that economic development is made more humane.

The potential and capacity of law in creating a facilitating environment for development processes was clearly acknowledged. For example, legal provisions may be used to promote intersectoral planning, budgeting and implementation, adequate resourcing, especially to match the volume of service-delivery delegation by government. In relation to human resources, law is useful for transformation and for the development of staff and clients.

With respect to service delivery organisations, the legal provisions can be used to prescribe standardisation in training and monitor the quality of services. For example in the family service industry, different kinds of skills are often required in respect of a matter. A different set of skills is required for counseling a victim of domestic violence as would be required for preparing such a person as a witness in legal proceedings, and usually the same organisation is required to provide these distinct services. It therefore becomes imperative that legal benchmarks are established to guide the training of service providers in these areas, irrespective of the source of the organisation's funding.

(vii) Employment Issues

All six organisations had comprehensive staff policy documents covering issues such as leave, recruitment, work schedule, organisational ethics and so on. These administrative provisions are supplemented by the provisions of employment law.

Apart from one organisation which had a designated personnel officer, staff issues were the responsibility of the Administrative Officer in the other organisations. Employee size in all but one of the organisations was too small for the workers' forum provided for by the Labour Relations Act, which requires a minimum of one hundred staff to constitute a workers' forum. Periodic staff meetings however served the needs of staff. In one organisation, an Equity Committee was put in place to monitor compliance with equity legislation.

Variations exist in the remuneration packages of different organisations, depending on how well established the organisation is. The key components are reflected in Table 1 below. In some organisations, the benefits were built into the salary.

In one of the organisations, only a flat salary is given while the other two provide benefits. The benefits package in one, a women's organisation includes 4 months maternity leave plus 50% salary; with the other 50% paid from the Unemployment Insurance Fund. A 7 ½ % benefits package is available to be invested as employee elects. The employment contract for the Provincial Co-ordinator was for three years, while for all others, it was 2 years. The other organisation, a provident fund is operated and medical aid is provided, while for annual leave, sick leave and compassionate leave are provided. These benefits are calculated as part of total package on recruitment and enures to all permanent staff. The Provident Fund is non-contributory with a fixed rate of 12%, and covers the incidents of disability and death. While the Provident Fund is optional for contract staff, permanent staff must belong to Provident Fund, but medical aid is optional for all.

Table 1: showing different benefits packages⁵

NPO	A	B	C	D	E	F
Staff Policy	Yes	Yes	Yes	Yes	Yes	Yes
Employment Document	Yes	Yes	Yes	Yes	Yes	Yes
Remuneration package	Salary only	Salary + 7½% of salary to investment of choice	Salary + medical aid	Salary inclusive of med. aid	Salary + med. aid & bursary	Salary + med. aid annual bonus,
Occupational Hazard pay	-	-	-	-	-	-
Terminal Benefits	-	-	Provident Fund	-	Pension Fund	Provident fund

⁵ NPO means nonprofit organisation, denoting the six organisations used as A, B, C, D, E and F.

(viii) Fundraising and Limitations on Grant Funds

All organisations acknowledged that grants, which are mostly from foreign sources, come with circumscribing limitations which are usually budget focused and do not accommodate discretionary expenditure. Moreover, budgets tend to be project-focused as funders are often unwilling to finance infrastructural development and overhead costs. Further, some grantors insist on yearly, as opposed to multi-year funding. However, the more established of the organisations (C, E and F in the table) seemed to enjoy a better deal as they determine their priorities and negotiate and renegotiate grant terms with funders. Overhead expenses provided in funding application budgets are usually limited to between 7 and 12% of project, but actual general overhead can run to 28%. Budget line items are adhered to or changed with donor's permission.

Further, funds from the United States are usually accompanied by stipulations against applying the funds towards lobbying activities, which restricts the nature of advocacy that can be carried out by a nonprofit organisation.

Some organisations have found that by including fundraising as one of the objectives in the founding document of the organisation, approval of the founding document for purposes of registering the organisation effectively serves as approval for the fundraising objective. In order to cater for staff remuneration other than basic salary, such as bonuses and overtime, some of the organisations factor these into human resource costs in budgeting, while others build it into client costs.

(ix) Promoting Organisational Use of the Law

It is important to assist nonprofit organisations (NPOs) to build capacity in a process oriented way, by first, creating awareness about a particular law or legal provision and explaining how this will affect NPOs. Services can be provided to NPOs to enable them comply with the law, so that when the law is implemented, it will be effective in its goal.

Emerging from the interviews was the perception of law in a dual capacity of provisions to be complied with and provisions to be utilised in the work of nonprofit organisations. In respect of the former, the fact that a law requiring nonprofit organisations to be registered is now in force creates a framework that attaches credibility to an organisation and makes it easier for it to apply for donor funding. The proposed review of the section 21 of the Companies Act 1973⁶, dealing with incorporation of associations not for gain, was also considered a necessary measure to simplify procedures for a nonprofit organisation that wants to register as a company limited by guarantee.

With regard to the latter, the law needs to be kept current as it is at the centre of most advocacy work which nonprofit organisations engage in as primary or secondary aspects of their mission. Even where nonprofit organisations are primarily set up for

⁶ Act No. 61 of 1973.

service delivery, they invariably get involved in legislative advocacy at some point to create a facilitating legal environment for the achievement of their core mission.⁷

(x) General Observations

The positive aspect of regulatory legal provisions is that it provides a clear regulatory framework for the work of nonprofit organisations, and by so doing, confers credibility to those organisations which are registered with the Nonprofit Organisations Act for instance. In seeking to comply however, a limitation of capacity on the government department responsible for effecting compliance was exposed. On the other hand, the registration requirements of the Nonprofit Organisations Act tends to have an exclusionary effect on smaller organisations who find it difficult to meet those requirements and so, are excluded from funding that could otherwise be open to them. This may be a justification of the critique made by Swilling and Russell that the Nonprofit Organisations Act was enacted without much empirical knowledge of the size and structure of the sector.⁸

One respondent mentioned the guidelines and principles on corporate practice set out in the King I and King II Reports on Corporate Governance, observing that since they do not have nonprofit organisations primarily in view, its management requirements and expectations are difficult for nonprofit organisations to meet.⁹

On the whole, there was an appreciation for the positive role of law in the work of nonprofit organisations.

⁷ This is also true of service delivery agencies elsewhere as shown by findings from a comparative study of direct service delivery and civic advocacy nonprofit organisations in the US. See A. Okoye, 'Human Resource Policies in the Nonprofit Sector: A Comparison of Civic-Advocacy and Service Delivery Agencies in Baltimore' (International Philanthropy Fellows research paper, Johns Hopkins University Institute for Policy Studies, Center for Civil Society Studies, December 2003).

⁸ M. Swilling and B. Russell, *The Size and Scope of the Non-Profit Sector in South Africa* (Co-published by the Graduate School of Public and Development Management, University of the Witwatersrand, The Centre for Civil Society and University of Natal, 2002) p.5.

⁹ See King I Report on Corporate Governance 1994 and King II Report on Corporate Governance 2002, accessed at the website of the Institute of Directors in Southern Africa, www.iodsa.co.za on 24/1/2006.

APPENDIX B

South Africa: Staff Survey Report

(i) Introduction

Questionnaires were distributed to two non-managerial staff in each of the six organisations where managerial staff were interviewed. Staff in all but one of the organisations responded, while one out of two staff responded in another organisation, bringing the number of respondents to nine out of twelve approached. The survey was intended to draw out in an exploratory way, information reflecting the character of the nonprofit sector as an employer, and how employees perceive their working conditions. The questionnaire used to draw out the information reported here is annexed as Appendix G.

(ii) Description of Respondents

Four respondents were of various cadres and divisions. Of the nine respondents, only one was male. This was not by design, but had to do with the availability of staff to complete the questionnaires. Three of the respondents were programme staff with administrative responsibilities, while the other six were core administrative staff. Four of the staff had the equivalent of a bachelors degree, while others had a high school matriculation qualification. All were full time staff.

(iii) Organisational Employment Policy

Recruitment of all but two was by direct interview. All the organisations had a staff policy document. All but two of the respondents had signed a written contract of employment at the onset of employment, in one case renewable yearly and in two others, every other year, while in the others, indefinite. Express contract terms in the employment document were supplemented by provisions from other sources, including organisational staff policy, oral agreement, periodic job profile and general practice in similar nonprofit organisations.

(iv) Benefits

The organisations had various combinations of benefits. The three oldest and more established organisations provided medical insurance and pension or provident fund benefits. Some remuneration-related provisions described as rare to find in nonprofit sector employment were occupational hazard pay and retirement benefits. The absence of

(v) Pros and Cons of work in the nonprofit sector

The key issues which staff consider unsatisfactory in nonprofit sector employment were low pay, the uncertainty of continued employment, lack of career paths, as well as the absence of benefits such as medical and retirement benefits. Salary increments and bonuses are dependent on funding secured from donors.

Other elements of employment which staff of nonprofit organisations would like to see included in their work situation are clear promotion procedures with accompanying increments in remuneration and long term funding which would facilitate planning and promote job security.

With regard to the advantages of working in the nonprofit sector, employees attach a high value to the personal satisfaction that comes with involvement in addressing the

issues that make up their respective organisations' focus. Further, the diverse nature of projects undertaken by nonprofit organisations is perceived by employees as presenting opportunity for personal and professional development and empowerment. While some consider the nonprofit sector a less pressured environment to work in than the business sector, the main pressure point felt by all employees is the uncertainty of funding which engenders uncertainty of continued employment.

(vi) Recommendations

Key recommendations coming from respondents were that retirement funds and medical aid should be an established part of employment in the nonprofit sector. The need was also felt for a dedicated human resource officer distinct from the administrative officer to oversee human resource issues. Of the seven who responded to the question on employees' associations, four felt the need for employees' associations in the nonprofit sector to handle employment disputes and protect employees from discrimination. The other felt that the small size of the organisation made this impracticable on the one hand, while on the other hand, the flexibility and ethos of nonprofit sector activity predisposed such organisations to addressing staff issues adequately.

There was a call for a nonprofit sector conference to develop the policies and practice on human resources in the nonprofit sector. It was felt that this would strengthen the recognition and contribution of the nonprofit sector's work. A strong recommendation was made for the adoption of long-term funding arrangements of three to five years. This rests significantly on donors' discretion, and while larger and more established nonprofit establishments may have more negotiating strength with funders, as a result of having established a track record of achievement, smaller and newer ones depend on the goodwill of donors who typically make small take-off or short term grants.

APPENDIX C

Nigeria: Managerial Interview Report

(i) Introduction

Managerial staff were interviewed in eight organisations. A list of organisations is included below. Broadly speaking, all the organisations are involved in civic-advocacy work in different areas. The Constitutional Rights Project (CRP) has as its focus, the promotion of the rule of law, the independence of the judiciary and the compliance of statute with international human rights standards, using legislative advocacy and judicial precedent-setting, among others. Community Action for Popular Participation (CAPP) works on the growth, development and empowerment of civil society for the purpose of promoting comprehensive development in grassroots communities. Women's Aid Collective (WACOL) and Civil Resources Development and Documentation Centre (CIRDDOC) offer legal aid services while working in the area of gender, research and human rights. Development Information Network (DEVNET) is an information management network aimed at building capacity of member nonprofit organisations. It also conducts research and policy analysis. Global Rights (GR) is an international agency which carries out its activities in Nigeria as the implementing agency of USAID. In this capacity, it finances and supports projects aimed at building the capacity of local NGOs to address broad human rights issues. These include training in legislative advocacy on various issues such as freedom of information, domestication of international conventions, statutory protection for proponents of transparency in government, otherwise known as 'whistle blowers'. Open Society Justice Initiative (OSJI) funds and supports programmes directed at promoting democracy and the rule of law in government and society. Legal Resource, Research and Development Centre (LRRDC) works in the area of human rights, developing research and information resources as well as advocacy tools for the work of human rights promotion. The questions used to draw out the information reported here are found in Appendix I, while a tabular representation of the organisational profile is reproduced in Appendix M.

(ii) Registration Status

Seven of the organisations were registered with the Corporate Affairs Commission (CAC) under the Companies and Allied Matters Act 1990 (CAMA). The eighth, an international organisation registered with the National Planning Commission (NPC) by means of a Memorandum of Understanding entered into with the NPC.

Registration with the CAC confers legal status on the organisation, which has the advantage of giving the organisation credibility with donors, thereby increasing access to funds. Further, CAC registration facilitates the work of the organisations around the country, while the annual returns required to be filed under CAMA serve to promote accountability. CAC registration promotes eligibility for tax exemption and gives potential partners confidence in dealing with the organisation.

For the above reasons, the provisions of CAMA on the registration of nonprofit organisations are perceived as very useful. One manager however was of the view that CAMA does not function effectively as a law regulating the nonprofit sector since it is not primarily focused at nonprofit organisations, but at the commercial sector.

(iii) Impact of law generally on the nonprofit sector

The Constitutional provision on freedom of association is clearly perceived as fundamental to the existence of nonprofit organisations. Next to this, it seems that CAMA is the only legislation which has a direct and clear cut effect on the establishment and structure of nonprofit organisations. Registration under the Companies and Allied Matters Act gives credibility to nonprofit organisations with funders. The tax exemption provisions of the Companies Income Tax Law 1979 provide are advantageous to nonprofit organisations generally, as there is no strict mechanism compelling them to validate claims of tax exemption. Nonprofit organisations seem to be in an ongoing debate with tax officials over the liability of the former to pay tax.

Other legal issues take the form of obstacles which are encountered as different nonprofit agencies undertake their particular mission. This is particularly true in regard to human rights organisations who find their path littered with numerous decrees inherited from the military era, which still have the force of law, since they have not been repealed. Typically these decrees and edicts contain provisions that preclude judicial review, divest courts of authority through ouster provisions and so on. Scores of such laws were identified in the published proceedings of a workshop convened for this purpose.¹⁰

A brief description of some of these laws follows. The Official Secrets Act Cap 335 prescribes a 14-year jail term for any body who obtains, reproduces or retains any “classified matter” without the permission of the Government of the Federation. The Students Union Activities (Control and Regulation) Act, in section 3(1) empowers the Minister of Education to suspend or otherwise discontinue a student’s academic enrolment in a tertiary institution if the Minister is of the opinion that public interest or public safety so demands. The Trade Disputes (Essential Services) Act Cap 433 LFN 1990, in section 1, empowers the President to prescribe trade union or associations in certain cases, thereby infringing on the constitutional right to freedom of assembly.

Other ways in which legal provisions affect the work of the nonprofit sector are seen in the way the law of trusts and contracts define rights and limit liabilities of NGOs.

(iv) Effect of Legal Requirements on Administration

There was a clear appreciation of the framework created by law for the work of nonprofit organisations.

With regard to the legal framework for establishing nonprofits, CAMA was for the most part, perceived by some as providing space for structural forms of nonprofit activity. Although it was acknowledged that it is not specifically tailored to the needs of functional nonprofit organisations, it provides a clear procedure for the establishment of the nonprofit organisation.

¹⁰ See *Legislative Agenda For Legal Reforms and Human Rights* (Abuja: Constitutional Rights Project, 2002), being proceedings of the Stakeholders’ Roundtable on the Repeal of Obnoxious Laws held on the 13th and 14th November, 2001 at the House of Representatives Hearing Room, National Assembly Complex, Abuja, Nigeria, pp. 35-50, 54-66, 78-109.

Employment law was seen to be effective in preventing the payment of discriminatory salaries, the promotion of gender balance in employment and the prohibition of forced labour, especially for those organisations that carry out development activities in grassroots communities.

In respect of mobilization of people for associational activity, the constitutional provisions on freedom of association coupled with international human rights instruments create the right environment for participation.

(v) Effect of Legal Requirements on Organisational Mission

Legislation which touches on the core of an organisation's mission often finds itself at the forefront of the organisation's mission. For instance, while organised labour may primarily concern itself with issues to do with wages, conditions of work and social justice crusade, the Labour bill passed in the late 2004 which curtails its power quickly became assimilated in its immediate mission.

Conversely, the passing of new laws increases the tools for an organisation to advance its mission. The Child Rights Act 2004 as well as the Widows and Widowers Law passed in a number of states in the South-East and South-South zones of the country had such an effect on the work of the Women's Aid Collective in Enugu, and that of CIRRDOR in South-East Nigeria. The latter has exercised its capacity, enhanced by the law, to embark on the active protection and promotion of widows' rights by educating para-legals who work with Widows' Centres in communities on the provisions of the law, and recovering widows' properties from in-laws. CIRRDOR constituted an informal tribunal known as the National Tribunal on Violence Against Women, comprising a panel of respected citizens, to hear and make recommendations on domestic violence issues, which led in some cases to the prosecution of offenders.

(vi) Promoting Organisational Use of the Law

The conviction is firm among nonprofit practitioners in Nigeria on the twin role of law, namely that legal provisions provide a regulatory framework for organisations, and knowledge of the law promotes assertion of human rights.

There is a convergence of views on the necessity of placing a legal duty on government to allocate a percentage of government revenue to the nonprofit sector. One view is that this duty be discharged through a central civil society body that is not controlled by government.

Another kind of law which would be empowering for nonprofit sector organisations is one requiring updated documentation of government activities made accessible to the public. This is the ethos of the Freedom of Information Bill, initiated in 1999 and currently being lobbied at the Senate by the Freedom of Information Coalition.¹¹ Parallel to this is the need for a civil society-based regulatory body administering a similar requirement for nonprofit organisations in line with good corporate governance.

¹¹ See <http://www.internews.org/mra/campaigns/freeinfo.htm>, accessed on 27/1/2006 for a text of the bill.

(vii) Views on the Role of Law generally in development processes.

Respondents find that law supports and backs rights protection work. The mutually supportive dynamics between nonprofit organisations (NPOs) and the law was reflected in the fact that NPOs are often involved in lobbying for the passage of bills that relate to issues in their area of work. When such lobbying or legislative advocacy succeeds, the law enhances the legal capacity of such organisations to carry out their activities and advance the organisational mission. An example of this is the Child Rights Act 2004 which a number of NGO Coalitions lobbied for. Further, the Widows and Widowers Law 2001 of Enugu State, in which the Women's Aid Collective played a leading role.

In respect of policy issues, civil society input has become significant since the transition to civilian rule. For example, the National Economic Empowerment and Development Strategy (NEEDS) developed in 2003, received significant input from the Civil Society Coalition on Poverty Eradication.¹² At the state level, the free child education policy was used by NGOs with a gender focus to promote girl child education. Another area in which the imperative of law is particularly pronounced is in respect of the need to police informal justice processes.

In terms of a generic legislation governing the operations of various forms of nonprofit organisations, the predominant attitude of nonprofit practitioners is that any further regulation or governance of nonprofit organisations in Nigeria should come from within the sector itself, and any power created by any law or policy document in this regard should be exercisable by a civil society body democratically constituted for that purpose by nonprofit organisations themselves. Consequently, a government bill for the regulation of nonprofit organisations in 2001 received no support from the civil society community and did not materialise into an Act.¹³ Coming a short two years after the transfer of power from the military regime to an elected civilian government it was resisted out of concerns that it might amount to giving the State undue control over organisational forms of civil society.

(viii) Employment Issues

About half of the agencies had a regular workers' forum, by way of staff meetings, with two specifically having a staff-focused event, one by way of an annual staff retreat and the other through a welfare meeting. In five of the organisations, personnel issues were attended to by the administrative officer. Only two organisations had a dedicated personnel manager. Seven of the organisations had a distinct staff policy document, while staff policy was communicated by means of a statement attached to the letter of employment in one. In respect of the international agencies, staff policies were determined from the Headquarters outside Nigeria.

The contents of staff policies were generally comprehensive, covering terms of employment such as working hours, remuneration, maternity leave and other leave provisions, disciplinary procedures, termination. Only two agencies had definite

¹² See <http://www.nigerianeconomy.com/> accessed on 27/1/2006 for the text of the NEEDS document and <http://www.dfid.gov.uk/countries/africa/nigeria.asp> , accessed on 27/1/2006 for a brief discussion of the NEEDS document.

¹³ See *Assembly Watch* (Newsletter of the Constitutional Rights Project, Vol.2, No.12, May 2001), pp.1-3.

terminal benefits linked to length of employment. There was only one mention of leave allowance from the local agencies.

Benefits given to staff varied between organisations, but on the average, each organisation offered a combination of three core benefits out of a wide range including the following ten: medical aid, accommodation allowances, leave allowances, transport allowances and car advance, corporate insurance, end of year bonus, long service bonus, children's fees, staff welfare fund and terminal benefits

(ix) Fundraising and Limitations on Grant Funds

The agencies were unanimous on the subject of limitations imposed by donors, who are mostly foreign funders. In respect of administrative expenses, office overheads usually the most neglected except for institutional grants, which are often capped. In terms of organisational mission, funds are usually linked to policies in home countries, and consequently, most funders preclude spending on political activities and lobbying. Some limitations have to do with the geographical location of projects. Generally, grants are linked to specific projects, and channeling funds to an unapproved project would be a breach of the grant agreement which would usually entitle the funding partner to repudiate.

Discrepancies between focal areas of funders and organisational focus also poses its own limitations and challenges, as nonprofit organisations often find themselves expanding or narrowing their focus in order to fit into funders' area of interest. Sometimes funders prescribe the type of agencies grantee organisations may partner with in carrying out projects, as well as duration and timeline for projects.

(x) General Observations on Challenges in Nonprofit Sector Activity

From the interview, a number of observations were made, reflecting the engagement of nonprofit sector practitioners with issues of application of law to the nonprofit sector. The depth of familiarity with legal provisions is perhaps attributable to the fact observed by one of the respondents that NGOs in Nigeria have been human rights centred in the recent past.

It is clearly recognized that law is essential for nonprofits to achieve their objectives because a legal framework serves as a basis for other things and other forms of regulation. Further, it is acknowledged that adherence to existing laws will make a big difference.

While associational activities in some areas such as health projects delivery are relatively free from restrictions, some others tend to experience resistance in achieving their objectives. This is especially the case with those nonprofit agencies involved in information acquisition. Ultimately lack of access to vital information affects virtually every area of nonprofit activity. A consensus area for legal intervention is on access to public information held by government agencies. Other areas are constitutional and electoral reform.

Another bottleneck acknowledged apart from the obstacles to obtaining information is the challenge to legislative advocacy posed by lack of co-operation and sometimes outright opposition by members of legislative houses. Yet another issue of concern is that of accountability to target groups and monitoring the quality of delivery. These

are needs that cut across the whole spectrum of nonprofit activity, and in the view of an officer of one of the international agencies, accountability projects should be carried out in an all-inclusive way for nonprofit organisations working in different areas.

On another dimension, the fact that the nonprofit sector is largely dependent on foreign funding and to some extent 'donor-driven' poses challenges to an independent internal regulation of its activities. One observation specifically felt that there was a role for Nigerian nonprofit organisations in reconstruction and service delivery in the peacekeeping operations of the Nigerian government in neighbouring countries.

(xi) Recommendations

Pertinent recommendations were made by respondents on the present needs and future direction for the nonprofit sector in Nigeria. Nonprofit organisations have to deal with two different agencies to secure the tax exemption certificate. First, it has to register with the Corporate Affairs Commission. Secondly, it then applies to the Board of Internal Revenue, which deals with tax issues for the certificate of tax exemption. A recommendation was made for these two processes to be fused.

Considering the limited capacity of government for direct development delivery, funds should be voted for development activities by the nonprofit sector. This could be accommodated in the appropriation bill as budgetary provisions for service delivery.

Dispute resolution law and mechanisms were recommended for NGO-funder agreements as well as employment agreement with staff. The Freedom of Information bill was perceived as a potentially powerful tool in carrying out the mission of various kinds of NGOs.

Organisations involved in conflict resolution encountered in the course of administering legal aid see an acute need for a law that gives the Memorandum of Understanding emanating from dispute resolution processes some legal strength by making it binding on the parties and admissible and enforceable in court.

The need for specific insurance product tailored to the needs of employees in the civil society sector was mentioned, as well as the increasing need for in-house lawyers distinct from programme staff. Closely related to this is the point on the need for staff of nonprofit organisations to be well informed and trained on the legal framework for nonprofit organisations generally as well as the legal provisions affecting their organisations specifically.

The nonprofit sector is no doubt an expanding sector, and as an institutionalisation process unfolds in the Nigerian nonprofit sector, the appreciation of law in its relevance to the work of nonprofit organisations and to development processes in general grows.

APPENDIX D

Nigeria: Staff Survey Report

(i) Introduction

Out of the twenty organisations initially identified, twelve were selected from three broad geographical zones, distributed as follows: five in Lagos (south-west Nigeria), four in Enugu (south-east Nigeria), and three in Abuja (north-central Nigeria). The thematic areas earlier outlined are reflected in the work of the organisations studied. Questionnaires were administered, and interviews were conducted where necessary to clarify answers. Field work was carried out in Nigeria between January 2003 and January 2005. The principal tool used for this aspect of the research was part 2 of the questionnaire in Appendix J. The term nongovernmental organisation (NGO) is used in reporting this research.

(ii) The Selection Process

The selection of the organisations was based on the three basic criteria of thematic focus, size of organisation and geographical location. On the first criterion, it was considered that in order for the research to be fairly representative of the nonprofit sector, the research subjects should cut across the key thematic areas of civil society concern such as human rights and legal reform, gender and development, research and policy advocacy, health and environment, democracy and governance, all with a civic-advocacy component.

On the second criterion, the cultural diversity and variations in perceptions and responses to issues of social concern among the multi-ethnic and multi-religious citizenry made it imperative that organisations should be drawn from at least three areas representing the historical geo-political divisions of Nigeria. The cultural distinctiveness of these geo-political zones is of course greatly tempered by the metropolitan character of the locations of the organisations studied, and no significant differences attributable to the difference in location emerged. The three study locations (Abuja, Lagos and Enugu) have either been national or regional capitals at one time or another.

On the third criterion of size of organisation, it was necessary to study organisations with a staff strength that presents a discernible employment pattern. For this reason a staff strength of not less than four full-time employees became a criterion. Predictably, organisations that met this criterion were located in urban areas where the more professionalised civic-advocacy organisations are to be found.

(iii) Description of Staff

Twenty three staff from the twelve organisations selected completed questionnaires. Out of this number, fifteen were women, while eight were men. Ten of the respondents were, by designation programme staff while the others were administrative staff, made up of administrative officers, accountant, secretaries, librarians, research assistants, office assistant and front desk officers. Sixteen of these had a minimum of a bachelor's degree or its equivalent. Of this number, at least five have an educational qualification higher than a bachelor's degree. Out of the remaining seven, four had a diploma and three a high school leaving qualification, the equivalent of a matric in South Africa. All respondents were employed full time.

From these facts and figures, it is obvious that the overall staffing of NGOs in the different parts of the country is of a relatively high quality.

(iv) Employment Issues

Apart from eight who responded in the negative, all others had signed contracts of employment. Eleven workers employed at will for an indefinite duration of time, while three had definite two year contracts. Eleven respondents, representing eight organisations referred to the organisation's conditions of service as the exclusive or supplemental source of the terms of their employment. Two referred to the practices in other NGOs as a source of their employment terms, while two referred to oral agreements as the basis for their employment. On the employment provisions generally found in NGOs, the provisions on pension, withdrawal benefits, occupational hazard and overtime pay were cited most as the non-existent. Out of twenty two responses, fourteen, from nine organisations found one or more aspects of employment in the nonprofit sector to be unsatisfactory.

Unsatisfactory aspects had mainly to do with the absence of retirement benefits such as gratuity or pension, the insecurity of employment created by fixed term contracts, the problem of limited career advancement, lack of access to micro credit facilities by way of salary advances, difficulty in securing bank credit because of uncertainty of employment, infrequency of bonuses, absence of occupational hazard and paid overtime provisions as well as absence of a reference point for fixing salaries of non profit staff. Other observations were peculiar to particular organisations and had to do with the length of the working hours, the absence of written terms, the length of notice required to resign and secrecy in the conduct of official matters.

(v) Employee Associations in the Nonprofit Sector

None of the 23 respondents belonged to an employees' association, but nine respondents, from five organisations considered it necessary. Two respondents had as their reasons, the creation of an opportunity for workers to share experiences and network, while eight responses focused on the employees' association as a forum for issues of workers' welfare to be articulated, a platform for solidarity and unity to be forged among workers for the protection of their rights, and for the conditions of work in the nonprofit sector to be reviewed and improved by law. Those who did not consider it necessary, took that position on the ground that since different organisations had different areas of focus, differing agenda, varying terms of service and different ways of carrying out their operations, it would be difficult to have an employees' union. Other reasons were that given the fact that many NGOs were typically pressure groups, it would not be an expedient location for a workers' union. Others felt that it may not be useful, and that management and staff dialogue within each organisation should be sufficient. Another felt that the Nigeria Labour Congress was under a duty to represent all workers.

(vi) Recommendations

Suggestions made for the improvement of working conditions in the nonprofit sector include incorporating relevant terms of employment from the civil service, making appointments permanent, making a law to provide for gratuity and pension, provision of occupational hazard and work severance pay, ensuring adherence to work and break hours, with an eight-hour workday, creating and disseminating written terms of employment, adopting a policy of transparency that makes organisational policy,

financial management and employment conditions known and developing a standard wage scale for nonprofit organisations.

(vii) General

Other observations were that policies of nonprofit organisations often depend on donors' policies. Non-donor funds are realized from the sale of publications and other items and these are used to provide incentives to staff, such as rent advance and car advance. From the responses given, it is clear that employment issues are recognized as problematic within the ranks of nonprofit organisation staff. However, the ways of addressing these needs remain grossly under explored.

University of Cape Town

APPENDIX E

Nigerian Nonprofit Organisations: Profile

(i) Introduction

Information was gathered from 14 nonprofit organisations with the aim of preparing a profile of an urban based civic-advocacy nonprofit organisation. Of the 14 organisations used for the profile, 3 were based in Abuja in the North-Central geopolitical zone of the country, 6 in Lagos in the South-West and 5 in Enugu in the South-East. The tool used for gathering the information is found in Part 1 of Appendix J, while tabular representations of key aspects of this report are presented in Appendix K.

(ii) Staffing Characteristics

A total of 183 staff were employed in the 14 organisations used for the profile, giving an average staff strength of 11.2. Of this number, 91 were men, while 87 were women. 154 were full time staff, while 29 were part time staff. Of the 154 full time staff, 81 were women, while 73 were men. This shows that while the total number of men employed is slightly higher than that of women, the number of women in full time employment is higher than that of men. 72 of the full time staff had a first degree or its equivalent or higher. Of the 29 part time staff, 21 were men, while 8 were women. 62 of the total staff were managerial, and of this number, 37 were women, while 25 were men.

Apart from three organisations (21%) who indicated 3 to 4 hours a week for part timers, others calculate it as number of days a week, that is 79% of 14 organisations. While all the organisations work 5 days a week, the working hours differed, with 8 of the organisations (57.1%) working 8 hours a day, another five (35.7%) working 9 hours a day and one (7.1%) working 10 hours a day.

(iii) History and Structure

Only one of the organisations was registered before 1990 (7.1%), while 5 (35.7%) were registered between 1990 and 1995, 7 (50%) were registered from 1996 to 1999, while one (7.1%) was registered in 2000. This tends to agree with the literature which indicates that formal civil society associations emerged in the late 1980s and increased rapidly in the 1990s while the military manoeuvred their way from one transition programme to another.

While all the organisations were registered with a government agency at the national or state level, some with both. While 10 (71.4%) were registered with the Corporate Affairs Commission, a Federal Government agency, 4 (28.5%) were registered with a government agency in the state where it is located.

The spread of the organisations varied. 8 (57.1%) of the organisations had more than one office in Nigeria, 3 (21.4%) had a single office in Nigeria, another one (7.1%) had its headquarters in Nigeria, and an office outside Nigeria, while 2 (14.2%) are established outside Nigeria, and maintain an office in Nigeria.

(iv) Funding

The eleven nonprofit organisations received funding almost entirely from foreign sources. While 5 (35.7%) received their main funding from diplomatic missions, another 4 (28.5%) received funding from foreign governments, and 5 (35.7%) received funding from international agencies based in Nigeria and 1 (7.1%) received some funding from the Nigerian Government. One organisation (7.1%) also sourced funding from membership dues. The figures stated do not indicate these sources as the exclusive sources of funding. Rather they reflect the percentage of the fourteen organisations that receive funding from such sources.

Of the 14 organisations, 12 responded to the question on whether there were limitations imposed by funders on the expenses on which they could expend grant monies, and all 12 responded in the affirmative. 9 (64.2%) mentioned office overheads like rent and office equipment and vehicles, 8 (57.1%) mentioned limitations related to staff remuneration, such as bonuses or advances, while those who mentioned both kinds of restrictions were 4(28.5%). Four mentioned other kinds of restrictions such as preclusion from political campaign.

Out of 13 responses, ten of the organisations (71.4%) said they were tax exempt while 2 (14.2%) said they pay tax. While 3 (21.4%) answered in the affirmative to deducting tax from staff salaries, 7 (50%) answered in the negative and 4 (28.5%) gave no response.

(v) Employment Issues

While 8 (57.1%) referred to the organisation's condition of service as the primary source governing employment terms and conditions 6 (42.8%) mentioned the contract of employment and one (7.1%) mentioned oral agreement. Two (14.2%) indicated that they referred to more than one source.

Only 3 (21.4%) of the orgs indicated that they remunerate their staff for overtime, while 8 (57.1%) pay bonuses and 7 (50%) occasionally approve loans and advances to their staff. Out of 12 responses, 5 (35.7%) of the organisations make contributions on behalf of their staff to the Nigeria Social Insurance Trust Fund, while 7 (50%) answered in the negative.

(vi) Conclusion

The findings show that the nonprofit sector in Nigeria has become a major source of employment, attracting highly skilled staff. The predominance of foreign sources of funding as well as the magnitude of the demand for the services rendered by nonprofit organisations has meant that those engaged in work in this sector have become very professionalised. A high level of professionalism is required to meet the criteria for grants, as well as the often detailed accounting and reporting requirements especially in the post military years.

APPENDIX F

South Africa: Managerial Interview Questions

Section 1: Organisational Profile

1. Type of organization (*for eg registered as a trust, voluntary association or section 21 company*)
2. Is the organization registered with any government department?
3. When was the organization established?
4. Focus area of organization
5. Spread of organization's activities (*eg international, national, province, city, community*)
6. What are the organization's sources of funding? (*Please give an estimate of the percentage of the organization's total funding made up by each source*)

Source	% of total funding
Foundation Grants	_____
Corporate Donors	_____
Individual Donations	_____
Government grants	_____
Government contracts	_____
Membership dues	_____
Other (<i>eg fees, events and publications, etc.</i>)	_____
7. What is the tax status of the organization?
8. Staff Structure a. Full time staff M.....F..... b. Part-time staff M.....F.....
c. Regular volunteers M.... F..... d. Contract staff.... e. First degree +
9. a. Number of managerial staff M..... F..... b. Board membership M... F....

Section Two: Legal Issues in the Non Profit Sector

1. Is the organization registered under the Nonprofit Organisations Act 1997?
2. If so, what benefits, if any, does the organization enjoy from this status?
3. What, in your view, is the usefulness of the NPO Act to the nonprofit sector in South Africa?
4. What, in your opinion, is the usefulness of other legislation affecting the nonprofit sector in South Africa such as the Income Tax Act 1962 as amended?

5. Can you think of other specific laws that have had a significant impact, positive or negative, on the work of the organization or on the work of non profit organizations in South Africa directly or indirectly (*for eg. tax laws, corporate law, employment law, information laws*)?
6. In what ways has the legal environment governing the nonprofit sector facilitated or affected the organisation in terms of:
 - a. its organizational/administrative or operational framework?
 - b. the mission and work of the agency?
7. In what other way do you think the law would be useful in facilitating the work of the nonprofit sector?
8. How would you rate the role of law in development processes generally?
Marginally relevant, relevant....., very relevant....., indispensable.....
9. How would you rate the role of law in developmental activities undertaken by nonprofit organizations?
Marginally relevant....., relevant....., very relevant....., indispensable....
10. Does the organization have a workers forum, (whether registered under the Labour Relations Act 1995 or not?)
11. Is there a human resource/ personnel officer?
12. Does the organization have a staff policy document?
13. If so, what issues are covered?
14. If not, how are employee matters determined? (e.g. code of conduct, benefits, advancement procedures, disciplinary issues, termination of employment etc.)
15. Does the organization provide a benefits package to its staff?
16. If so, what benefits are employees entitled to?
17. Are there limitations on the application of grant funds by donor organizations?
18. If so, what are the common areas of limitation?
19. Any other comments on the role, effect or impact of law in the non profit sector?

APPENDIX G

South Africa: Non-managerial Staff Questionnaire

1. Position within the organization.....
2. a. Educational qualification..... Gender: M.... F....
3. Nature of employment Full time__ Part-time__ Volunteer__ contract labour__
Other *(please explain)* _____
4. If part-time, what other work do you do? _____
5. How were you recruited? *(for e.g. direct interview, job agency placement, other)* _____
6. Were you given a staff policy manual or a similar document when you were recruited? Yes__ No__ Other _____
7. Did you sign a written contract or document stating the terms and conditions of your employment? Yes__ No__
8. If 'yes' to 7, for how long will your present contract last?
One year__ two years__ three years__ indefinite__ other *(please explain)* _____
9. If 'yes' to 7, how are those terms of employment not expressly covered by your contract determined? *(for example, is it based on an oral agreement, the organization's staff policy, general practice in non-profit organizations in your community, donor policies, collective agreements of coalitions etc. Please indicate as many as apply, and other sources not mentioned here)*

10. If you answered 'no' to 7, how are the terms of your employment determined? *(for e.g. is it based on an oral agreement, the organization's employment policy document, general practice in your non-profit sub-sector etc., collective agreements of coalitions of non-profit organizations, donor policies. Please indicate as many as apply)*

11. What benefits are you entitled to receive from your organization? *(for e.g. overtime pay, bonuses, loans and advances, health insurance, accident insurance paid sick leave, paid maternity leave, annual leave, contributions to pension funds, withdrawal or retirement benefits)*

12. What are the general terms and conditions of employment observed by non-profits working in your sub-sector that you know of? *(for e.g. provisions on*

working hours, overtime, sick leave, maternity leave, annual leave, occupational hazards, contributions to pension funds, discipline, complaints procedure, promotion, withdrawal benefits etc.)

13. From your experience working in a non-profit, are there aspects of employment terms and conditions in your organization or in non-profits in your sub-sector or in non-profits generally which you consider to be unsatisfactory? If yes, please describe the unsatisfactory aspects.
-
-
-

14. If yes to 13, what would you recommend as suitable ways of addressing these issues?
-
-
-

15. Do you know of any employees' association in your area of work? _____

16. If yes to 15, do you belong to such an association? Yes ___ No ___

17. Do you consider it necessary to have employees' associations in the non-profit sector? *Pls give reasons for your answer* _____

18. How do you perceive terms and conditions of employment in the non-profit sector as opposed to those of the business and govt. sectors? *(for eg. does the fact that your employer is donor funded have any effect on your employment conditions?)*
-
-
-

19. Why have you chosen to work in the non-profit sector?
-
-
-

20. Please feel free to make any other remark which you consider relevant to the development of policies and practices on human resources in the non-profit sector
-
-
-

APPENDIX H

South African Nonprofit Sector: Generic Statistics

Table 1: Scope and Size of the South African nonprofit sector, denoted by size, employment and income

	Sub-sector	No. of NPOs	% of total	F/T emp	P/T emp	Volunteers (FTE)	Total emp	% of total	Total (R) income
1	Culture and recreation	20587	20.8	27729	307	70740	98776	15	813m
2	Education & research	5730	5.8	23962	1629	5548	31139	5	815m
3	Health	6517	6.6	39494	1225	15577	56296	9	2.486b
4	Social Services	22755	23.0	81692	12066	50450	144208	22	3.738b
5	Environment	3396	3.4	21098	2039	9818	32955	5	869m
6	Development and Housing	20382	20.6	55113	1464	43935	100512	16	2.787b
7	Advocacy and Politics	6800	6.9	24370	879	64457	89706	14	911m
8	Philanthropic intermediaries and voluntarism promotion	310	0.3	1551	72	865	2488	0.4	16m
9	International	212	0.2	100	13	145	258	0.04	0
10	Religion	11706	11.8	26597	3558	52743	82898	13	810m
11	Business and professional associations	525	0.5	3305	62	2713	6080	1	766m
	Total	98920	100	305011	23314	316991	645316		14.011b

Source Swilling and Russell, pp.23,34 and 39¹⁴

¹⁴ R in the last column on total income represents Rand, the figures are weighted and stated to the nearest million rand.

APPENDIX I

Nigeria: Managerial Interview Questions

Section 1: Organisational Profile

7. Type of organization (*for eg coy lid by guarantee, registered as a trust, or voluntary association*)
8. Is the organization registered with any government department?
9. When was the organization established?
10. Focus area of organization
11. Spread of organization's activities (*eg international, national, state, city, community*)
12. What are the organization's sources of funding? (*Please give an estimate of the percentage of the organization's total funding made up by each source*)

Source	% of total funding
Foundation Grants	_____
Corporate Donors	_____
Individual Donations	_____
Government grants	_____
Government contracts	_____
Membership dues	_____
Other (<i>eg fees, events and publications, etc.</i>)	_____
7. What is the tax status of the organization?
10. Staff Structure a. Full time staff M.....F..... b. Part-time staff M.....F.....
c. Regular volunteers M.... F..... d. Contract staff.... e. First degree +
11. a. Number of managerial staff M..... F..... b. Board membership M... F....

Section Two: Legal Issues in the Non Profit Sector

1. Is the organization registered under CAMA 1990?
2. If so, what benefits, if any, does the organization enjoy from this status?
3. What, in your view, is the usefulness of CAMA to the nonprofit sector in Nigeria?
4. What, in your opinion, is the usefulness of other legislation affecting the nonprofit sector in Nigeria (*for eg. Tax laws, laws relating to freedom of association etc?*)

5. Can you think of other specific laws that have had a significant impact, positive or negative, on the work of the organization or on the work of non profit organizations in Nigeria directly or indirectly (*for eg. tax laws, corporate law, employment law, information laws*)?
6. In what ways has the legal environment governing the nonprofit sector facilitated or affected the organisation in terms of:
 - a. its organizational/administrative or operational framework?
 - b. the mission and work of the agency?
7. In what other way do you think the law would be useful in facilitating the work of the nonprofit sector?
8. How would you rate the role of law in development processes generally?
Marginally relevant, relevant....., very relevant....., indispensable.....
9. How would you rate the role of law in developmental activities undertaken by nonprofit organizations?
Marginally relevant....., relevant....., very relevant....., indispensable....
10. Does the organization have a workers forum, (whether registered under any labour statute or not?)
11. Is there a human resource/ personnel officer?
12. Does the organization have a staff policy document? (*for eg. Conditions of Service, personnel policy manual etc.*)
13. If so, what issues are covered?
14. If not, how are employee matters determined? (e.g. code of conduct, benefits, advancement procedures, disciplinary issues, termination of employment etc.)
15. Does the organization provide a benefits package to its staff?
16. If so, what benefits are employees entitled to?
17. Are there limitations on the application of grant funds by donor organizations?
18. If so, what are the common areas of limitation?
19. Any other comments on the role, effect or impact of law in the non profit sector?

APPENDIX J

Nigeria: Organisational Profile and Staff Questionnaire

PART I: Organisational Profile (To be completed by managerial staff)

1. Number of full-time staff ____ Men ____ Women ____
2. Number of part-time staff ____ Men ____ Women ____
3. Number of managerial staff ____ Non-managerial staff ____ Women ____ Men ____
4. Normal working hours: Full-time staff _____ Part-time staff _____
5. Type of non-profit organisation:
 NGO [] CBO [] Faith-based [] Professional Association [] Other (please explain) _____
5. Focus area of organisation (*tick as many as apply*):
 Human Rights [] Civil Society [] Democracy Development []
 Legal Reform [] Prisoners' Welfare [] Labour rights []
 Gender & Development [] Women's rights [] Women's health []
 Widows' Welfare [] Children and Youth [] Health [] HIV/AIDS []
 Environment [] Entrepreneurship [] Research []
 Other (please describe) _____

6. Spread of Organisation:
 ____ Organisation with single office in Nigeria
 ____ Organisation with ____ offices in Nigeria only
 ____ Organisation with headquarters in Nigeria and office(s) outside Nigeria
 ____ International organisation with an office in Nigeria
7. Main sources of funding (*tick as many as apply*)
 ____ Grants from foreign donor agencies
 ____ Grants from international donor agencies based in Nigeria
 ____ Grants from diplomatic missions in Nigeria
 ____ Direct funding from foreign governments
 ____ Grants from Nigerian donor organisations
 ____ Grants from Nigerian government
 ____ Income from membership dues
 ____ Other (Please explain) _____

8. What (if any) are the common limitations on expenditure specified by donor organisations (i.e. what are the main areas in which the application of grant funds is restricted)? Consider, but do not limit your answer to the following:

- (a.) Overhead costs for e.g.: office rent _____ office maintenance _____
 office vehicles _____ office equipment _____
- (b.) Staff Remuneration & Welfare: overtime pay _____ bonuses _____ loans & advances to staff _____ insurance & social security contributions _____ withdrawal benefits _____
- (c) Other (*please specify or explain any of the above in more detail*):

9. What is the source of employment terms and conditions in your organisation? (*for example: individual written contract of employment, oral agreement, organisation's conditions of service, general NGO practice in your community, collective agreements of NGO coalitions*) _____

PART II: Staff Survey (To be completed by non-managerial staff)

1. Position within the organisation: _____

2. Nature of employment: Full-time _____ Part-time _____

3. If part-time, what other work do you do? _____

4. Did you sign a written contract of employment? Yes _____ No _____

5. If you answered 'Yes' to 4, for how long will your present contract last?
 one year [] two years [] three years [] indefinite []
 other (please explain) _____

6. If you answered 'No' to 4., what are the terms of your employment?

7. If yes to 4, how are those terms of employment not covered by your contract determined? _____

8. What are the general terms and conditions of employment observed by NGOs in your community that you know of? (*for e.g. provisions on working hours, overtime, sick leave, holiday, occupational hazards, contributions to pension funds, discipline, promotion, withdrawal benefits etc.*)

9. Are there any aspects of working terms and conditions in your organisation or in non-governmental organisations generally which you consider to be unsatisfactory?

Yes _____ No _____

10. If yes, please indicate the unsatisfactory aspects and give reasons:

11. If yes to 9, what do you recommend as suitable ways of addressing these needs? (Please explain clearly)

12. Do you belong to any labour association of NGO workers?

13. Do you consider it necessary? Yes _____ No _____

14. If yes to 13, why do you consider it necessary? _____

15. If no to 13, why do you not consider it necessary? _____

16. Please feel free to make any other remarks you consider relevant to the subject-matter of this research:

APPENDIX K

Tabular Presentation Of Appendix E Report

Table 1

Location of NGOs by City and Geo Political Zones of Nigeria			
	Lagos (South-West)	Abuja (North-Central)	Enugu (South-East)
Number of NGO	6	3	5

Table 2

Establishment Period				
	Before 1990	1990 - 1995	1996 - 1999	2000 - 2005
No of NGO Registered	1 (7%)	5 (38%)	7 (50%)	1 (7%)

Table 3

Nongovernmental Organizations Statistics										
Statistics	Total Number of Staff	Average Staff Strength.	No. of Men	No. of Women	Full-time Staff		Part- time Staff		Managerial Staff	
NGO Organizations	184	11.2	91	87	154		29		62	
					M	F	M	F	M	F
					81	73	21	8	25	37

Table 4

Fulltime Employees				
	No. of Men	No. of women	With minimum Bachelors degree or equivalent	With less than a Bachelors degree
Fulltime Employees (154)	81	73	72	82

Table 5

Part-time Employees				
	No. of Men	No. Of women	First Degree or Higher	No First degree
Part-time Employees (29)	21	8		

APPENDIX L

South Africa: Profile of Organisations Used for Appendix A Report

Organisation	Type	Year /Contact	Focus Area	Respondent
<i>Institute of Democracy in South Africa</i>	Section 21 company (Company limited by guarantee)	1987 www.idasa.org.za	Democracy promotion, capacity building for government and civil society	Vincent Williams Admin. Manager 21/6/2004
<i>Institute of Justice and Reconciliation</i>	Section 21 company (Company limited by guarantee)	2000 www.ijr.org.za	Reconciliation and social reconstruction in post TRC-South Africa	Fannie du Toit Exec. Director 10/6/2004
<i>Legal Resources Centre</i>	Trust	1978 www.lrc.org.za	Human Rights and Public Interest law	William Kerfoot Director & Charlene Josephs 14/12/2005
<i>National Institute for Crime Prevention and the Reintegration of Offenders</i>	Voluntary association with a section 21 micro-credit subsidiary	1910 , renamed in 1970 www.nicro.org.za	Crime prevention, offender rehabilitation, victim support and job creation	Venessa Padayachee 8/11/2005
<i>Resources Aimed at the Prevention of Child Abuse and Neglect</i>	Section 21 company (Company limited by guarantee)	1990 www.rapcan.org.za	Development of resources for the prevention of child abuse and neglect	Carol Bower Exec. Director 20/9/2005
<i>Western Cape Network on Violence Against Women</i>	Voluntary Association	1989 Saartjie Bartman Womens' Centre Athlone 27 21 633 5287	Addressing violence against women through advocacy, training etc.	Cheryl Ayogu Provin. Co-ordinator 15/6/2004

'Year' stands for the year the organisation was established

APPENDIX M

Nigeria: Profile of Organisations Used for Appendix C Report

Organisation	Type/ Year	Location	Focus Area	Respondents
<i>Civil Resources Development and Documentation Centre</i>	Incorporated Trustee(CAMA) 1996	Enugu www.cirddo.org	Resource Centre for women's human rights, co-ordinates women's NGOs	Gina Ndubisi Programme Co-ordinator 20/1/2005
<i>Community Action for Popular Participation</i>	Incorporated Trustee(CAMA) 1993	24 Borno St. Garki Abuja	Capacity building for grassroots organisations for community development	Clement Wasah Executive Director 13/1/2005
<i>Constitutional Rights Project</i>	Incorporated Trustee(CAMA) 1990	Lagos & Abuja www.crp.org.ng	Promoting Human rights, rule of law, independence of the judiciary	Yinka Lawal Executive Director 12/1/2005
<i>Development Information Network</i>	Incorporated Trustee(CAMA) 1994	Lagos www.devnetnigeria.org	Information management, NGO capacity building, research, policy analysis and networking	Bankole Olubamise Acting Exec. Director 6/6/2005
<i>Global Rights</i>	USAID implementing agency, accredited by National Planning Commission	US-based, date not obtained www.globalrights.org	Funding and technical support for specific human rights and NGO capacity building programmes	Ann Ikpeme Senior Programme Officer 14/1/2005
<i>Legal Research and Resource Development Centre</i>	Incorporated Trustee(CAMA) 1990	Lagos Tel 234 1 864733	Human Rights advocacy, development of resources	Ayo Atsenuwa Exec.Direc. Kamarudeen Omiwole 28/1/2005
<i>Open Society Justice Initiative</i>	Incorporated Trustee(CAMA)	US-based, date not obtained www.justiceinitiative.org	Funding and technical support for law reform, legal education reform etc.	Chidi Odinkalu Director 13/1/2005
<i>Women's Aid Collective</i>	Incorporated Trustee(CAMA) 1997	Enugu Tel 234 42 256678	Legal aid for women, gender, human rights and good governance	Onyinye Ohia Chinelo Uwakwe Legal 19/1/2005

'Year' stands for the year the organisation was established

APPENDIX N

Nigeria: Organisations used for profile in Appendix E

	Organisation	Location		Organisation	Location
1	African Institute of Applied Economics (AIAE)	128 Park Avenue, GRA Enugu 234 42 256644 aiae@infoweb.abs.net	8	Gender and Development Action (GADA)	14 Adebola St. Surulere Lagos www.gadanigeria.org
2	Center For Democracy & Development (CDD)	2 Olabode Close Ilupeju, Lagos www.cdd.org.uk	9	Legal Research and Resource Development Centre (LRRDC)	386 Murtala Mohammed Way, Yaba Lagos
3	Centre for Women's Studies & Intervention (CWSI)	14 Ibadan St. Area 3 Garki Abuja cwsinig@yahoo.com	10	Network of Nigerian Nongovernmental Organisations (NNNGO)	Opposite TBS, Onikan Lagos
4	Civil Liberties Organisation (CLO)	13 Soji Adepegba St. Off Allen Avenue Ikeja, Lagos	11.	Womens' Action Research Organisation (WARO)	Upper Chime New Haven Enugu
5.	Civil Resource Development & Documentation Centre (CIRDDOC)	4 th Dimension Publishers Premises City Layout Enugu www.cirddoc.org	12.	Women's Aid Collective (WACOL)	9 Umuezebi St. New Haven Enugu Tel 234 42 256678
6	Community Action for Popular Participation (CAPP)	24 Borno St., Garki Abuja	13	Women for Women International (WFW)	Odo St., Abakpa Nike Enugu
7.	Constitutional Rights Project (CRP)	Abuja and Lagos 1 Abiona Close, Surulere, Lagos Plot 2103 Harper Crescent Wuse 7 Abuja	14	Women's Rights Advancement Protection Alternative (WRAPA)	Plot 792 Ademola Adetokunbo Crescent, Wuse II Abuja